

1 IN THE DISTRICT COURT OF THE UNITED STATES
2 FOR THE NORTHERN DISTRICT OF OHIO
3 EASTERN DIVISION

4 GROENEVELD TRANSPORT)
5 EFFICIENCY INC.,)
6) Judge Nugent
7) Cleveland, Ohio
8)
9) Civil Action
10 vs.) Number 1:10CV702
11 LUBECORE INTERNATIONAL,)
12 INC.,)
13)

14 Defendant.

15 -----
16 TRANSCRIPT OF PROCEEDINGS HAD BEFORE
17 THE HONORABLE DONALD C. NUGENT
18 JUDGE OF SAID COURT,
19 ON THURSDAY, OCTOBER 20, 2011
20 -----
21 **VOLUME 6**
22 -----
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31 U.S. District Court
32 801 West Superior, #7-189
33 Cleveland, OH 44113-1829
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34 Proceedings recorded by mechanical stenography; transcript
35 produced by computer-aided transcription.

1 THURSDAY SESSION, OCTOBER 20, 2011, AT 8:27 A.M.

2 (Proceedings in the absence of the jury:)

3 THE COURT: Well, how was your search last
4 night.

08:27:52 5 MS. MICHELSON: I'm sorry?

6 THE COURT: I said how was your search last
7 night?

8 MS. MICHELSON: I think you'll be pleased,
9 your Honor.

08:27:52 10 THE COURT: Not me.

11 MS. MICHELSON: Your Honor, we did -- we did
12 look carefully at the testimony of Mr. Van der Hulst and we
13 also looked at the Sixth Circuit authority on the issue, and
14 there is -- there are a number of relevant cases here. Not
08:27:52 15 just Antioch and its progeny which is essentially a core
16 functional component out of which everything else, including
17 the exterior shape design and appearance flowed.

18 In the case -- in our case, we are talking about
19 obviously the overall appearance and presentation of the
08:27:52 20 product, but also the unique and distinctive shape, whether
21 the shape is Dick fated by that core component, and the
22 evidence is that it is not. And Mr. Van der Hulst's
23 testimony, I have specifics, but then taken into the context
24 of the whole of his testimony, I will -- I will read it to
08:27:52 25 you.

1 And there's a little bit to put the fullness of it in
2 context, just about less than a page.

3 "Question: Were the commercial people and the sales
4 people at Groeneveld involved in the design of the EP-0
08:27:52 5 Groeneveld pump?

6 "Answer: Of course. We make -- we make art
7 impression at that time. We make some sketches. How it
8 would look like. I think we made even another model to show
9 the pump to the people to management because there was money
08:27:52 10 involved and we need to show what we are going to do. So
11 they had an idea of the shape and the function is only yeah,
12 telling how it will function, that's not too easy but the
13 shape we have to show it. Yeah.

14 "Question: Does the shape or outline of the pump
08:27:52 15 affect the way the thing performs, the 28 delivers grease
16 throughout the system?

17 "Answer: No.

18 "Question: Explain there to the jury. It might be
19 obvious, but I'm sorry, I will ask you to explain.

08:27:52 20 "Answer: It's like a car. No, the car go from A to B
21 and they're all different. The shape has nothing to do with
22 the function of the moving from A to B. And it's the same
23 as the lubrication system. The only thing we have to do is
24 create energy and that there's an outlet where grease is
08:27:52 25 coming out. How you do that, you can do it in many, many

1 many ways."

2 Additional testimony that he gave along with this
3 specifics, a reasonable jury can infer from this testimony
4 and the totality of Mr. Van der Hulst's testimony and
08:27:52 5 understanding of course that he is speaking in English and
6 trying to convey his eye December in a language that isn't
7 his first tongue, that there was separate, independent
8 thought given by Groeneveld when it created its ultimate
9 product to how the thing would look, and how to present it
08:27:52 10 to the market. And that it was not dictated by what's going
11 on inside the functional part, and that the shape and the
12 silhouette and the outline of that pump is independent of
13 what's going on inside and the functioning parts that make
14 it work.

08:27:52 15 THE COURT: Okay.

16 So I guess what you're saying is that would be -- the
17 outside appearance -- I'm trying to put a -- wouldn't that
18 include the color and the logo? If that's what you're
19 saying is the trade dress, is the appearance of it, doesn't
08:27:52 20 that include the logo and the color as well?

21 MS. MICHELSON: The shape and the silhouette
22 do not include the logo and the red --

23 THE COURT: You're saying the look of it.
24 Trade dress has to include the logo and the color, doesn't
08:28:17 25 it? But, if it was all -- it was a blue bottom?

1 MS. MICHELSON: If -- okay. I'm going to try
2 to address what you're asking me. In terms of functionality
3 and nonfunctionality, the --

4 THE COURT: No, no, no, no. I asked you.

08:28:17 5 MS. MICHELSON: Okay.

6 THE COURT: Specific question. You're now
7 telling me that your claim in this case that the trade dress
8 is the appearance of the outside appearance or the shape of
9 the pump, am I right?

08:28:17 10 MS. MICHELSON: The shape -- the shape then,
11 the silhouette.

12 THE COURT: What it looks like.

13 MS. MICHELSON: That I --

14 THE COURT: What it looks like.

08:28:22 15 MS. MICHELSON: Yeah.

16 THE COURT: When somebody looks at it.

17 MS. MICHELSON: Yes.

18 THE COURT: That's what you're saying, you
19 have a distinctive shape, am I right.

08:28:22 20 MS. MICHELSON: Yes, I think that is the
21 testimony.

22 THE COURT: Okay. So when you look at it,
23 that would include the logo and the color, is that true?

24 MS. MICHELSON: It -- well, it does but not
08:28:22 25 for purposes of the nonfunctionality analysis.

1 THE COURT: How do you separate it? Because
2 that's how it appearance.

3 MS. MICHELSON: Because the -- the logo and
4 the color has no impact on the shape or the silhouette of
08:28:26 5 the pump.

6 THE COURT: You just read to me something that
7 they take it to the marketing people, that would include the
8 color and the logo, what it looks like, how you present it
9 to the public.

08:28:26 10 MS. MICHELSON: Yes.

11 THE COURT: So it would include those two
12 things.

13 MS. MICHELSON: That's part of it, but --

14 THE COURT: Include means part, doesn't it.

08:28:28 15 MS. MICHELSON: It's part of it but not for
16 nonfunctionality analysis. Yes, there were thoughts that --
17 there are -- there are I know I'm not answering your
18 question and aim trying to.

19 The logo is not part of the shape. It is not part of
08:28:28 20 the -- and it has nothing to do with the functionality or
21 nonfunctionality of the item.

22 THE COURT: You're trying to claim trade dress
23 and I guess -- I guess you can't exclude the logo and the
24 color if you're trying to do the appearance of the pump as
08:28:32 25 your trade dress.

1 MS. MICHELSON: We are -- I do not believe
2 that we've made a claim that the logo and the green is part
3 of the trade dress.

4 THE COURT: Your.

08:28:32 5 MS. MICHELSON: That the shape --

6 THE COURT: Your confusion claim is if
7 somebody looks at it they wouldn't know what it is.

8 MS. MICHELSON: They're different pieces of
9 evidence are relevant -- our position is different pieces of
08:28:35 10 evidence are relevant to different elements of the number of
11 claims that we have asserted here.

12 THE COURT: Okay. Let me hear from you, Tom.

13 BY MR. ANASTOS:

14 Q. What I heard the plaintiff say they called out of
08:28:35 15 Mr. Van der Hulst's testimony was that the shape does not
16 affect the way it delivers the grease, and you can deliver
17 the grease many, many ways. This goes back to the same
18 thing they were saying yesterday. There are different ways
19 you can do this. Had that is not the test of functionality.
08:28:38 20 There was no evidence that they came back with that
21 addressed the inward test of functionality in terms of
22 different costs or ornamentation or the way it looks or the
23 fact it's somehow not influenced by engineering in terms of
24 how it came into existence. Magistrate Baughman found the
08:28:38 25 evidence in this case shows all the elements of Groeneveld

1 pump are there for some practical benefit or reason. In
2 other words, Groeneveld has not presented its pump in any
3 way the equivalent of an automotive tailspin, a purely
4 ornamental figure that contributes no demonstrable benefit
08:28:42 5 to the operation or efficiency of the designed product.

6 That is as true today as it was at the preliminary
7 injunction hearing. There is nothing about that pump that
8 is ornamental, nothing that is fanciful, nothing that is
9 arbitrary at all about the look of it. It is 100 percent as
08:28:45 10 I argued yesterday, 100 percent the result of engineering
11 issues from the way the base looks, to the way the reservoir
12 looks, to the size of the reservoir to the cap on the
13 reservoir to the follower plate in the reservoir.
14 Everything about the look of that pump is the result of
08:28:45 15 engineering influence. And then they put the label on it,
16 and the only reason they put the label on it is because
17 that's the only way anyone can tell it's a Groeneveld pump?

18 THE COURT: You can respond to that. I --

19 MS. MICHELSON: I --

08:28:54 20 THE COURT: There is -- I'm asking you, and
21 this is what I asked for yesterday. Is there any evidence
22 at all of -- that the design is nonfunctional? And you
23 still haven't offered me any evidence.

24 MS. MICHELSON: The evidence is that the shape
08:29:10 25 of it doesn't make it work and pump grease and Mr. Eissis

1 himself.

2 THE COURT: Where is that? See I think you're
3 missing the point of the definition of function is what the
4 requirement of trade dress is. You -- this is -- at least
08:29:27 5 what I didn't hear much what the design of the pump is the
6 design of the pump. All right, that's basically what we
7 heard from the plaintiff in your case in chief.

8 And you decided to design it this way and it works
9 this way. Okay.

08:29:43 10 MS. MICHELSON: The inside, and then he
11 layered on -- then they -- the commercial people came in and
12 they layered on the way it would be presented on the
13 outside, and -- and there's -- the placement of specific
14 parts that create this shape and this silhouette is --
08:30:08 15 there's in reason for them to be in those specific places.

16 THE COURT: Where do you say that? Where is
17 the evidence of that?

18 MS. MICHELSON: Your Honor, I mean Mr. Van der
19 Hulst did testify that he -- that he would not make it this
08:30:47 20 same way today because it is more expensive to make it look
21 this way today, to have this particular shape and design
22 today. Why is Groeneveld still making the pump, its own
23 pump exactly this way if it's harder and more expensive to
24 do so? Because it's our pump, we went on the market with
08:31:07 25 this pump. Everyone knows this pump."

1 THE COURT: That's not answering the question.

2 MS. MICHELSON: I'm looking, I'm looking for
3 some --

4 THE COURT: I listened to the Defense's
08:31:19 5 testimony. Mr. Vermeulen. He said it's 100 percent
6 functional. Every aspect the pump how it was designed, how
7 he designed it is 100 percent functional and I guess I'm
8 asking is there anything that the plaintiff put on that said
9 that it's not. Is there any part of the design that's
08:31:35 10 nonfunctional?

11 MS. MICHELSON: I think when Mr. -- when
12 Mr. Van der Hulst describes how the shape and the silhouette
13 and the outline and the way it was put together was not --
14 was how do I say this right?

08:31:57 15 THE COURT: You see, there's not.

16 MS. MICHELSON: That it didn't --

17 THE COURT: Just because you can make it a
18 different way doesn't make it nonfunctional. The question
19 is how is this made and the reason this was made. Now,
08:32:09 20 maybe they went and got a design from sales people and said
21 could you do it this way and said yeah we could, that's
22 okay, but still doesn't mean it's nonfunctional. You got to
23 have somebody testify.

24 MS. MICHELSON: It's non -- I'm sorry.

08:32:21 25 THE COURT: You have to have somebody testify

1 that there's something on that. That it's done just for the
2 sake of art, not for the sake of utility.

3 MS. MICHELSON: I think he did, your Honor,
4 respectfully did talk about we -- about there's art
08:32:34 5 impressions on the sketches that they made for the outside
6 of it that would -- that in order -- you know, how they
7 would present the guts of it, that actually of the things
8 that make the pump operate in the system. And he did
9 testify to that artistic impression and that that -- that --

08:33:06 10 THE COURT: Anyway.

11 MS. MICHELSON: I -- somebody just handed me
12 something. Thanks for helping me out here.

13 "Question: Why did you want to make your pump look
14 different than anybody else's? It's a challenge of the
08:33:16 15 designer, and each let's say you want to make something
16 different than anybody else. Yeah, you want to do that. So
17 we want to give it a groove look so this has to be our pump
18 for many, many years and it has to be good and nice."

19 I think from the totality -- this testimony and.

08:33:33 20 THE COURT: See, that doesn't answer the
21 question about functionality. That talks about appearance.

22 MS. MICHELSON: It talks -- esthetics correct.
23 It's separate from functionality and that the esthetics was
24 a separate and distinct consideration that would -- that
08:33:50 25 Groeneveld undertook --

1 THE COURT: But you're missing the whole point
2 of what functionality is, what part of that -- where is
3 there evidence to show they put a gas -- a grease port in
4 one location versus another for esthetics and it has nothing
08:34:07 5 to do with functionality? Or that they used the clear
6 plastic for esthetics and not for functionality?

7 MS. MICHELSON: The -- there's testimony in
8 the record that the shape of it is for the aesthetics and
9 the presentation and the and the look and how --

08:34:25 10 THE COURT: Who testified in your case they
11 got the clear plastic it was just invented and they came in
12 long sheets and cut it up because they wanted to be able to
13 see through?

14 MS. MICHELSON: Your Honor, we are not -- we
08:34:34 15 are not claiming that specific -- that the individual
16 components, in and of themselves do not perform some sort of
17 function. We're --

18 THE COURT: Then your case is over if you're
19 not claiming that.

08:34:47 20 MS. MICHELSON: I don't -- I respectfully
21 disagree, your Honor, because the fact that component parts
22 have a function does not -- is not dispositive on the issue
23 of nonfunctionality. If -- in a products configuration
24 case, if they are put together in a way that is not
08:35:07 25 essential to the use and purpose of the article, and there

1 are shape cases and configuration cases and over all
2 appearance cases, and each of these cases is really when you
3 read the authority, they --

4 THE COURT: Tell me what evidence and where is
08:35:25 5 the evidence is in this case that shows -- tell me what part
6 of your pump is nonfunctional?

7 MS. MICHELSON: The shape of it and the
8 silhouette and outline of it.

THE COURT: That's nonfunctional?

08:35:36 10 MS. MICHELSON: Yes.

08:35:52 15 MS. MICHELSON: Well, it needs a housing, yes.

16 THE COURT: Right.

17 MS. MICHELSON: But the housing doesn't have
18 to be shaped particularly in this way in alignment.

19 THE COURT: But the housing was shaped like
08:36:01 20 that and it serves a function to hold the grease, right?

MS. MICHELSON: And it doesn't have to be put
together with the reservoir and the cap and the beveling and
all these distinctive things.

24 THE COURT: See that's where you're missing
08:36:15 25 the point because on trade dress, to have a unique trade

1 dress usually is logo or color or something like that. But,
2 if you go to the shape, okay, that's -- if you're claiming
3 that they used your same color or something like that,
4 that's a different an argument, but you're not arguing that.

08:36:31 5 You're arguing the shape, and all I'm asking you is where is
6 there any evidence that the way it's shaped is knot
7 nonfunctional? Because the way we have it now that you have
8 a holder for the grease on the top and it's clear, it was
9 done to hold the grease and so they could see the grease.

08:36:52 10 That's functional. It that's not appearance.

11 MS. MICHELSON: And the question to the
12 witness was.

13 "Question: Does the shape or outline of the pump
14 affect the way the thing performs, the way it delivers
08:37:01 15 grease throughout the system -H and he answered no and
16 explained the shape has nothing to do with the function of
17 the moving from A to B, that witness testified to that.

18 THE COURT: Who is that van der Hulst?

19 MS. MICHELSON: Yes.

08:37:17 20 THE COURT: All right. What do you think
21 about that, Tom? I mean that maybe enough to get it to the
22 jury on that issue, but I -- it is breath taking.

23 MR. ANASTOS: Just a couple of points, your
24 Honor. They're making it sound like there is an outside to
08:37:37 25 this, that was made to look nice, and we talked about this

1 with Mr. Van der Hulst. This is not an automobile that has
2 a shell to it that you can design in different fashions to
3 cover up all of the interior components. This is one of the
4 interior components. So there's nothing malleable about the
08:38:03 5 outside that can be done to make it artistic. It's not the
6 Mona Lisa. It's a grease pump. Secondly, there's a
7 thousand different reasons why Groeneveld could still be
8 selling this pump as this pump after 30 years, not the least
9 of which is it's a good pump. It functions well, and it
08:38:23 10 functions well because of the design. And the design is
11 entirely functional. Every component is there for
12 functionality and the overall design is functionality.

13 They testified in -- that Ms. Michelson just argued
14 that Mr. Van der Hulst testified that they wanted to make
08:38:42 15 something different. Different does not equal
16 nonfunctional. We've been over that a thousand times.

17 THE COURT: I know. That's why this is like
18 arguing a negative and you can't do it.

19 MR. ANASTOS: And I mean I could -- the law is
08:38:58 20 that we're engineering necessity influences the
21 configuration of the functional components, the resulting
22 design is functional. And that's from Abercrombie by one of
23 the Sixth Circuit cases, where the -- where the -- a
24 combination of functional elements has been configured in
08:39:16 25 such a matter to be protected.

Eissis - Cross

1 THE DEFENDANT: Courts hold such functional
2 figures must be configured in a quote, arbitrary, fanciful,
3 or distinctive way in order to be entitled to protection.
4 That's a quote from Antioch. There's No evidence whatsoever
08:39:30 5 that anything about that shape is arbitrary or fanciful or
6 distinctive. It's a grease pump that was put together
7 because of the way they wanted it to look. That's 100
8 percent of the evidence in this case.

9 THE COURT: Okay.

08:39:45 10 Let's continue with the testimony. I'll keep this
11 under advisement.

12 (Proceedings resumed in the presence of the jury:)

13 THE COURT: Good morning, ladies and
14 gentlemen.

08:41:39 15 THE JURY: Good morning.

16 THE COURT: Mr. Eissis, you can continue.

17 CROSS-EXAMINATION OF JAN EISSLIS

18 BY MS. MICHELSON:

19 Q. Hello, Mr. Eissis.

08:42:47 20 A. Good morning.

21 Q. I'm going to show you what has been marked as Defense
22 Exhibit in the case, Defendant's Exhibit I. Ma'am, excuse
23 me.

24 And can you confirm for us please these are pictures
08:43:17 25 of the Lubecore pump that were taken at the Toronto trade

Eissis - Cross

1 show that you testified about in your direct examination
2 that it was in April of 2008. Can you confirm that that is
3 a -- that those are pictures of the Lubecore pump, your
4 pump, that was at the Toronto trade show in April, 2008?

08:43:52 5 It's --

6 **A.** Can you show them one more time?

7 MS. MICHELSON: Sure. Can I just walk them up
8 to him, your Honor?

9 THE COURT: Sure.

08:44:05 10 MR. KUNSELMAN: Thank you.

11 THE WITNESS: Yeah, I believe this is at the
12 Toronto trade show. I think I remember gluing the stickers
13 on the side of the trailer there.

14 **Q.** Okay. And, in fact, I now have on the overhead we
08:44:20 15 marked those same pictures as Plaintiff's Exhibit 56. Can
16 you confirm that, please, these are the same photographs,
17 correct?

18 **A.** Yeah, probably, yeah.

19 **Q.** Do you need to take a closer look?

08:44:33 20 **A.** Yeah, it's correct, yeah.

21 **Q.** Okay. Thank you. And this is where you debuted your
22 pump in Canada at the Toronto trade show?

23 **A.** Yes.

24 **Q.** And I see a black cap on the filler. Is that the
08:44:52 25 filler coupling this --

Eissis - Cross

A. That's correct.

2 Q. And that's a black cap there?

A. Yeah, that's correct.

4 Q. Okay. And I see that they are -- you are in -- this
5 picture depicts the use of the color green, the grease is
6 green in this picture that you --

A. This pump is green grease, yes.

8 Q. Mr. Eissis, we were talking, I think, about the
9 Lubecore warranty program and when we broke yesterday. Do
0 you recall?

11 A. Excuse me?

12 Q. We were -- I'm directing your attention to where we
13 left off yesterday. I believe we were talking about the
14 Lubecore warranty program and I have a few questions about
15 that.

A. Okay. Oh, and --

17 Q. Before we get there, I have a question about this
18 Defense Exhibit you talked about. Defense Exhibit L, it's
19 hard to see because of the light, but it says here
20 component, Groeneveld fact, Lubecore fact, and then benefits
21 for Lubecore customers.

22 A. Yeah.

23 Q. It's hard to see because of the shading, but you agree
24 that this was a fact benefit analysis or a product
25 comparison sheet that Lubecore put together to distribute to

Eissis - Cross

1 customers and users of the product?

2 **A.** Yes, all to distributors, yeah.

3 **Q.** Yeah.

4 And directing your attention to -- here we go. The
08:47:03 5 first page of it, this says grease piston seal?

6 **A.** Yes.

7 **Q.** Okay. And under the Groeneveld fact, you put overing,
8 O-ring with backup ring?

9 **A.** Yes.

08:47:17 10 **Q.** Under the Lubecore fact, you identified as a benefit
11 that you instead use a quad ring?

12 **A.** Yeah.

13 **Q.** Okay. And in the column here, you tout the supposed
14 benefits of using a quad ring?

08:47:33 15 **A.** Yeah.

16 **Q.** Instead of the O-ring?

17 **A.** That's correct.

18 **Q.** Okay. And I believe -- and your testimony was that
19 the quad ring, in fact, had to be replaced with an O-ring
08:47:45 20 because it was defective and did not perform as well as the
21 O-ring, right?

22 **A.** Yes, this analysis was made before we knew of the
23 issue with the quad ring, and after that, also had to be to
24 an O-ring to make it work.

08:48:02 25 **Q.** In fact, sir, you brought with you to court and

Eissis - Cross

1 provided to you before your counsel did, right before your
2 testimony some additional product comparison sheets that
3 were marked as, I think that says Defense Exhibit DD,
4 Defense Exhibit DD?

08:48:27 5 **A.** Okay.

6 **Q.** And you testified about these product comparison
7 product comparison sheets during your direct testimony?

8 **A.** Yeah.

9 **Q.** And turning to the product comparison sheets relating
08:48:47 10 to the Groeneveld product -- I want to just identify it for
11 the record. It is the third substantive page of the
12 exhibit, your company continues to represent to customers
13 that the quad ring that Lubecore uses has a benefit to the
14 O-ring that Groeneveld uses. Do you see that here?

15 Groeneveld fact, O-ring with backup ring, Lubecore fact,
16 quad ring, and the benefits you still list there are
17 benefits to a customer using the lube product instead of the
18 Groeneveld because of the incorporation of this quad ring
19 that you testified was a big problem and a big mess. Just
20 says that there, right?

21 **A.** If this document is produced and used after we change
22 from quad ring to O-ring, that's a mistake in our behalf.

23 **Q.** And this is a document, this exhibit that you all
24 brought to court today, I mean --

08:50:20 25 **A.** This document was obviously made before we changed

Eissis - Cross

1 from O-ring to quad ring. I'll bring it out again. If we
2 used this document, that's a mistake on our behalf. We
3 shouldn't be using that anymore because the new pumps no
4 longer have quad rings.

08:50:38 5 Q. The pumps are hermetically sealed, correct?

6 A. Excuse me.

7 Q. The pumps are hermetically sealed, correct?

8 A. What do you mean by the term "hermetically sealed"?

9 Q. They are sealed to the outside world. The inside is
08:50:54 10 sealed off from the outside elements, right?

11 A. I would say so. It's not hermetically sealed. It is
12 fenced.

13 Q. There are valves that prevent air from the outside
14 from getting in?

08:51:11 15 A. No, this fence, venting holes in the pumps.

16 Q. Is it your testimony that the Lubecore pump is not
17 hermetically sealed, and that air from the outside world
18 gets into the pump, into the reservoir of the pump?

19 A. Above the follower plate, yes, air from the outside
08:51:34 20 has to get in. Otherwise, the follower plate can't go down.

21 Q. Above the follower plate?

22 A. Yeah.

23 Q. Not below the follower plate?

24 A. Below the follower plate is grease.

08:51:43 25 Q. And not inside the housing of the pump, right?

Eissis - Cross

1 **A.** Excuse me?

2 **Q.** Not inside the housing?

3 **A.** Inside the housing of the pump, the air is supplied
4 through the air supply of the truck, and that air is cleaned
08:51:59 5 through the air dry of the truck through a Descon filter so
6 the air that goes into the pump on the bottom is filtered by
7 the air system on the torque before it goes into the pump.

8 **Q.** That occurs below the grease piston?

9 **A.** Below the grease piston, the air goes in through the
08:52:36 10 filtering system on the truck, correct, through the
11 solenoid.

12 **Q.** Above the grease piston it is sealed, correct?

13 **A.** Above the grease piston, there's a special valve we
14 put in what we call an O-pressure valve that goes into the
08:52:54 15 side of the pump.

16 **Q.** Yeah, I don't think so. I -- I'm sorry. I don't
17 think I got an answer to the question. So -- I'm sorry.
18 Can you read my question back to me, ma'am?

19 (Thereupon, the record was read back by the Court
08:53:20 20 Reporter.)

21 **Q.** That's my question.

22 **A.** Above the grease piston, yeah, above the grease piston
23 it is -- we are creating an over pressure. It is not -- I
24 would have to explain that to you, the way it works is.

08:53:31 25 **Q.** Can you just answer the question? It's sealed, right?

Eissis - Cross

1 MR. ANASTOS: Objection.

2 THE WITNESS: It is sealed.

3 THE COURT: Overruled.

4 THE WITNESS: Sealed to the degree there is a

08:53:39 5 5 PSI overpressure left.

6 Q. Okay. And the --

7 A. Air cannot go from -- air from the atmospheric
8 condition, cannot go into that pump from any other way, into
9 my pump below the piston or above the air piston. It cannot
08:53:54 10 go in there without going through the air system of the
11 truck.

12 Q. And the PSI that's delivered to the pump is like a
13 thousand PSI, correct?

14 A. No, incorrect.

08:54:04 15 Q. What is it?

16 A. Excuse me?

17 Q. What is it?

18 A. The air pressure being delivered to the pump is 120
19 PSI.

08:54:13 20 Q. Okay. That's a lot greater than 5 PSI, right?

21 A. Yes, that's correct.

22 Q. Okay.

23 I'm showing you now what we've marked as Defense
24 Exhibit 86. There are a number of pictures, and we would
08:54:43 25 like you to -- the Defense Exhibit -- I'm sorry. Did I say

Eissis - Cross

1 Defense Exhibit? It's Plaintiff's Exhibit 86. And I'd like
2 you to please confirm that this is Lubecore's warranty,
3 Lubecore Warranty Process. This is your warranty plan?

4 **A.** This is a warranty plan, yes, a very old one.

08:55:07 5 **Q.** This is the only one that you're -- that Lubecore
6 produced to us in this case in response to our written
7 discover requests for all information regarding the product
8 and warranty information, right? This is the one you
9 produced to us, correct?

08:55:23 10 **A.** That is possible.

11 **Q.** If I represent to you that there's nothing in your
12 document production regarding Lubecore warranty manuals and
13 booklets and information, other than this document and this
14 document that we've marked Plaintiff's Exhibit 85, you will
08:56:08 15 not dispute that, would you?

16 MR. ANASTOS: Objection.

17 THE COURT: Sustained.

18 **Q.** Are you aware of any additional warranty information
19 regarding your product that your company produced in this
08:56:21 20 litigation?

21 **A.** Actually, it's a long time ago. I cannot answer that
22 question truthfully, so.

23 **Q.** Your warranty -- your warranty basically provides that
24 if customers used Lubecore 's grease in the Lubecore ALS,
08:56:48 25 you will warrant the products and the parts for a specified

Eissis - Cross

1 period of time, right?

2 **A.** That's correct.

3 **Q.** I believe -- is it three years?

4 **A.** We've made some changes, but I believe that it's a one
08:57:04 5 or two-year warranty on the pump normally on the system, and
6 if you use our grease, it goes up to six years. So it's an
7 additional four or five years. I think one year plus five,
8 one plus five or two plus four, something like that.

9 **Q.** Reading from Page 86-6, Plaintiff's Exhibit 86-6, it
08:57:27 10 indicates, "If you are an existing CPL Groeneveld customer,
11 with the use Steadylube grease, we will honor your existing
12 extended warranty. This means Lubecore will extend your
13 current Groeneveld grease warranty from five years to the
14 Lubecore six years. Lubecore will honor the replacement of
08:57:48 15 parts under the Groeneveld warranty from the original date
16 of purchase."

17 So your Lubecore warranty program warrants Lubecore
18 EP-0 ALS systems, right?

19 **A.** That's correct.

20 **Q.** And extends the warranty to customers who use the
21 Lubecore product?

22 **A.** That's only if -- only if a customer uses our grease
23 to the Steadylube grease.

24 **Q.** Correct.

08:58:18 25 And also provides the same warranty for Groeneveld

Eissis - Cross

1 customers, people who are using Groeneveld Products?

2 **A.** Yeah, if a Groeneveld customer, if we are dealing with
3 a Groeneveld customer, and the customer uses Groeneveld's
4 Green Lube grease, that was a warranty that would extend the
5 standard factory warranty to five years. In the market, we
6 had, my sales people, a problem with that and our
7 distributors because our customers, for example, would not
8 want to switch to two different greases. So we came up with
9 the plan to rebuild that because they were buying already
10 the special grease. So now, for example, this happened at
11 Town of Chondriomere, they bought Groeneveld Systems, and
12 they had Green Lube grease in the system. With that grease,
13 they would get an extended warranty.

14 **Q.** Sir, my --

15 **A.** An objection that they had was that because of the use
16 of the grease, they would have to use a special grease with
17 my system as well. So then they would say well, it would be
18 difficult for them to administer. They have it all over the
19 city and have to have two different greases in all the
20 locations. And when a truck would come in with a Groeneveld
21 system, they would have to use a Groeneveld Green Lube
22 grease and if a truck would come in with the Lubecore
23 system, they would have to use the down Steadylube grease
24 from Lubecore.

25 **Q.** And so, sir, my question --

Eissis - Cross

1 **A.** Basically made a commercial position to say okay, then
2 we will also honor that warranty so that we would take the
3 objection away from the customer to have to buy two
4 different greases. That is what the warranty program is all
09:00:00 5 about.

6 **Q.** Right.

7 And if there are system failures because Groeneveld
8 customers -- Groeneveld users -- let me -- let me rephrase
9 this.

09:00:16 10 Lubecore tells Groeneveld customers if you use our
11 grease in a Groeneveld product, we warrant the Groeneveld
12 pump and product, right?

13 **A.** Yeah, a customer.

14 **Q.** It's just a yes answer. You gave the whole
09:00:31 15 explanation. So we can kind of get to it if you just --

16 **A.** Customer --

17 **Q.** -- answer my questions.

18 **A.** I'm doing that.

19 **Q.** No. The answer I believe was yes. And so what
09:00:41 20 happens then?

21 THE COURT: He didn't give -- excuse me.

22 THE WITNESS: Actually, I'd like to give the
23 answer instead of you giving it for me.

24 **Q.** Well, it's cross-examination.

09:00:48 25 **A.** So when the Groeneveld customer uses Lubecore grease

Eissis - Cross

1 and the Groeneveld system, we will extend their warranty.

2 Q. Right. And so that means if something happens with
3 the Groeneveld part in a pump, Lubecore people will go out
4 and fix it or repair it or replace it with a Lubecore part,
09:01:09 5 right?

6 A. No. We would typically end up putting a whole new
7 pump on. Typically what we would need to do then is just
8 swap the pump out, and if it's a reservoir glass, we could
9 fix it with a reservoir or something, but if it's -- I would
09:01:24 10 be on the hook for another pump if that -- if that were to
11 happen. That's a risk I'm taking in order to get the rest
12 of their business or their new business and their grease
13 business because I would start selling all the grease to the
14 customers then.

09:01:37 15 Q. So you market your grease as compatible with the
16 Groeneveld pump because if people use your specialty grease
17 with the Groeneveld pump, you will provide them with
18 additional warranty benefits?

19 A. Yeah, I -- my Steadylube grease can also be used in a
09:01:55 20 Groeneveld pump and Groeneveld grease can be used in my
21 pump.

22 Q. The only competitor that you mention in your warranty
23 materials is Groeneveld, not anybody else, right?

24 A. That is very obvious because other competitors do not
09:02:17 25 have such programs. Only Groeneveld has.

Eissis - Cross

1 **Q.** But, you could give a warranty to other competitors
2 who use your grease in their systems if they're compatible,
3 if you were only -- if you were not only targeting
4 Groeneveld users?

09:02:31 5 **A.** If the customer does not have a Groeneveld system and
6 does not enjoy the extended warranty, it is not an objection
7 that I have to deal with. So I'm not going to give it away
8 if I don't have to give it away to get the business.

9 **Q.** Repairs and replacements are made by Lubecore
09:02:48 10 personnel and representatives, distributors and installers
11 if there are breakdowns in the pump or the Groeneveld system
12 if the customer is using Lubecore grease?

13 **A.** Yeah.

14 **Q.** Correct?

09:02:59 15 **A.** We will repair any greasing system if we get a service
16 call or the distributors get a service call, they will try
17 to fix anything that a customer ask them to fix in order to
18 sell labor and components, correct.

19 **Q.** So Lubecore people go out to work on Groeneveld
09:03:17 20 systems, right?

21 **A.** That would happen if the customer asked us to do that,
22 yes, for sure.

23 **Q.** And if part -- I'm not going to say it again.
24 Lubecore has no employees in the United States, right?

09:04:16 25 **A.** No, there's no current employees of Lubecore in the

Eissis - Cross

1 United States, correct.

2 **Q.** And there weren't any back about a year ago either,
3 were there?

4 **A.** No, that's correct.

09:04:29 5 **Q.** The distributors and the installers do all of the
6 actual work in the servicing in the United States?

7 **A.** Actually, currently, we also deal with some customers
8 direct in the United States, and we would actually go in
9 from Canada to do some work. We have done the work in the
09:04:48 10 United States as well.

11 **Q.** So that changed in the last year?

12 **A.** Yeah, that actually did, yeah.

13 **Q.** Yeah, okay.

14 So it could either be a Lubecore employee or
09:05:00 15 technician or a Lubecore distributor or installer who goes
16 out and does the servicing and the work, right? That's what
17 you just said?

18 **A.** The Lubecore technician would be, a Canadian that
19 would go into the United States, to perform the service at
09:05:16 20 this moment or we would use the services of one of our
21 distributors.

22 **Q.** And so those services could then, under a warranty
23 issue as we -- you just testified about, those services on
24 Groeneveld systems or pumps could be provided by actual
09:05:34 25 Lubecore employees, not just the distributors, right?

Eissis - Cross

1 MR. ANASTOS: Objection, your Honor. We are
2 way beyond the scope of my --

3 THE COURT: Really I don't even understand how
4 this is relevant to this case, but the objection is
09:05:44 5 sustained.

6 BY MS. MICHELSON:

7 **Q.** You provide technical training to the distributors
8 here in the U.S.?

9 **A.** The ones that need it, yes.

09:05:54 10 **Q.** And sales tools and promotional materials?

11 **A.** As well, yeah.

12 **Q.** Extend credit to them?

13 **A.** Yeah.

14 **Q.** You educate them about the different systems, the lube
09:06:04 15 systems?

16 **A.** When it's needed, yes.

17 **Q.** You gave them talking points to use during sales
18 presentations?

19 **A.** I call it sales tools, yeah.

09:06:12 20 **Q.** You are involved in the sales presentation personally
21 and in the preparation of promotional materials that they
22 use to distribute to end users, right?

23 **A.** Can you repeat that one? You had a whole bunch in
24 there. Can we do it one point at a time?

09:06:27 25 **Q.** You actively participate in sales presentations with

Eissis - Cross

1 your distributors in the U.S.?

2 **A.** I on occasion when asked, I'm in the area or they have
3 something that they feel is important that I could assist, I
4 would, yes.

09:06:40 5 **Q.** You provide -- I may have asked that one already. You
6 join them at trade shows where Lubecore products are
7 displayed? Talking about in the United States.

8 **A.** Yes, I will in the United States do that, yes.

9 **Q.** In fact, you always try to join them at the trade
09:06:55 10 shows, right?

11 **A.** Yeah, I always try to make a point of being there, but
12 I can make it to all shows.

13 **Q.** You pay for a portion of their attendance at trade
14 shows?

09:07:04 15 **A.** I do assist in that as well. Not always. When asked,
16 then we would give financial support.

17 **Q.** And you actually get involved in making sales calls to
18 end user customers on occasion?

19 **A.** On occasion, yeah.

09:07:19 20 **Q.** Okay. Including to a company called Millis Transport?

21 **A.** I've been at Millis Transport I believe once, yeah.

22 **Q.** You knew them to be a Groeneveld customer, correct?

23 **A.** Yes.

24 **Q.** You have the right to control your U.S. distributors'
09:07:43 25 dissemination of information about your products?

Eissis - Cross

1 **A.** I don't know anything about my rights, really.

2 Q. You agree that you probably have the right to control
3 their dissemination of information about your products?

4 MR. ANASTOS: Objection.

09:07:59 5 THE COURT: Overruled.

6 THE WITNESS: I do not know what my rights are
7 as far as dissemination of my information, of how they use
8 my information.

9 MS. MICHELSON: Can I get that overhead for
09:08:23 10 me?

11 Q. Page 288 of your testimony.

12 "Question: You could" -- from Line 1, you could --
13 "you control the right, you have the right to control the
14 dissemination of information about your products by your
15 United States distributors, correct?

16 "Answer: Actually, I don't understand your question.
17 Do I have the right to control what they say?

18 "Question: Yes.

19 "Answer: I don't know if I have the right. I give
09:08:51 20 them information to help them sell the product. I probably
21 have that right, yeah."

22 A. Well --

23 Q. I read that correctly?

A. Yeah, I was confused then and I'm confused now.

Q. You care what your distributors say about your product

Eissis - Cross

1 and how they market your product all over, right?

2 MR. ANASTOS: Beyond the scope, your Honor.

3 THE COURT: Yeah. Objection sustained.

4 Q. You promote your products in the United States by
09:09:22 5 supporting and promoting your distributors here, right?

6 That's how you do it?

7 MR. ANASTOS: Objection.

8 THE COURT: Sustained.

9 Q. You previously testified that people read on the
09:09:34 10 Internet and that what appears on the Internet is important
11 to business, to businesses images and to customer
12 perceptions, correct?

13 MR. ANASTOS: Objection.

14 THE COURT: Objection sustained. Move on to
09:09:49 15 something else.

16 Q. Have you taken any corrective action regarding the
17 U.S. distributors' web site information as we've gone over
18 in earlier testimony in the case?

19 MR. ANASTOS: Objection.

09:10:04 20 THE COURT: Sustained.

21 Q. Do you continue to supply your products to United
22 States distributors notwithstanding what appears on the web
23 sites?

24 MR. ANASTOS: Objection.

09:10:16 25 THE COURT: You can ask -- do you continue to

Eissis - Cross

1 distribute your products? Don't have to throw in the
2 editorial.

3 THE WITNESS: Yes, I continue to distribute my
4 products.

09:10:26 5 Q. You knew FSI had been a Groeneveld distributor for
6 many years?

7 MR. ANASTOS: Objection.

8 THE COURT: Overruled.

9 MS. MICHELSON: You may answer.

09:10:37 10 THE WITNESS: Sorry. I don't understand in
11 what context this question. Can you please repeat the
12 question?

13 Q. Okay. You know that FSI was --

14 A. Okay. I didn't hear FSI. Sorry.

09:10:48 15 Q. Sometimes the --

16 A. Yeah. Go ahead. The question, please.

17 Q. You know that FSI was a Groeneveld distributor for
18 many, many, many years?

19 A. Yes, I was aware that Groeneveld was a Groeneveld
09:11:01 20 distributor.

21 Q. And you actually came into contact with FSI as part of
22 your job with Groeneveld?

23 A. Yes, I met -- I met the people at FSI before I was
24 with Groeneveld and during I was with Groeneveld.

09:11:16 25 Q. What do you mean before? You mean when you were

Eissis - Cross

1 distributing?

2 **A.** When I was distributing the products in the period
3 from 1988 to, I guess, 2001, when I sold the first shares,
4 and I've met them then, and I also have actually any
09:11:35 5 dealings with them. Sometimes we work together a little bit
6 on some jobs, but then in -- after 2004, when I was director
7 of North American operations, then I actually visited them
8 and I had a few visits there where they had contact with
9 FSI, correct.

09:11:51 10 **Q.** Okay.

11 In direct examination, you talked about the Bijur
12 pump, B-I-J-U-R, pump. In fact, you've never seen installed
13 Bijur pump in the United States, have you?

14 **A.** I have not seen one. I've only seen it in trade
09:12:06 15 shows, have not seen them on trucks, correct.

16 **Q.** Yeah.

17 And, in fact, Bijur is in the industrial automated
18 lubrication application while Groeneveld is primarily in the
19 transportation mobile and heavy equipment applications,
09:12:20 20 right?

21 **A.** That is incorrect.

22 **Q.** It is?

23 **A.** Yeah. You go to the Bijur web site, it says Bijur
24 goes mobile. Just think of the Bijur web site. It says
09:12:34 25 Bijur goes mobile. That means the mobile industry. Trucks

Eissis - Cross

1 and mobile heavy equipment.

2 Q. The Bijur products are not the Bijur product line, you
3 determine that that is not a suitable product line for the
4 intended applications either yours or Groeneveld, right?

09:12:55 5 A. Incorrect.

6 Q. They're not in different fields?

7 A. The pump that we are talking about.

8 Q. Are Bijur and Groeneveld in different fields?

9 A. No, they're not, especially not today.

09:13:18 10 Q. This is from testimony you gave under oath previously.

11 "Question: What does Bijur do?

12 "Answer: Bijur is in the automated lubrication
13 systems business.

14 "Question: And that's exactly what Groeneveld does?

09:13:39 15 "Answer: In a different field, though. They are in
16 the industrial automated lubrication and Groeneveld is in
17 transportation, mobile, heavy."

18 And heavy equipment I read that correctly?

19 A. When was this document --

09:13:53 20 Q. Did I read that correctly?

21 A. From this document because --

22 Q. Well, does your testimony change, depending on what
23 proceeding you're involved in? Did I read that correctly?

24 THE WITNESS: Yes, very much so.

09:14:03 25 MR. ANASTOS: Objection.

Eissis - Cross

1 THE COURT: Excuse me. Tell him the date that
2 was given.

3 MS. MICHELSON: January of '08.

4 THE WITNESS: Oh, that explains it because
09:14:13 5 Groeneveld just bought a company. It has -- went into a
6 company that's called Volner, and they are in the industrial
7 lubrication and Groeneveld also does industrial lubrication
8 in the Netherlands. Bijur, within the last two years, came
9 out with a product line, the Maxi-flow, and they got after
09:14:34 10 that in the two years they got into on the web site. Now,
11 they promote I go mobile -- Bijur is going mobile. So
12 January, 2008 is -- how long ago is that? Anyway today, I'm
13 answering this correctly and then I answered it correctly as
14 well.

09:14:49 15 Q. Did you -- Lubecore did no independent testing on its
16 EP-0 single-line system before releasing it to the market?

17 A. The only testing that was done by somebody you got
18 from Martin in Korea where he said he had cycles made on the
19 pump. We did not do field testing before we went into the
09:15:33 20 market.

21 Q. You just put them on the trucks?

22 A. Yeah, that's right, yeah.

23 Q. You did no independent assessment of any testing Tae
24 Sung may have done on the pumps either, right?

09:15:49 25 A. No, I believed Martin. I did not certify what he

Eissis - Cross

1 said.

2 Q. Those are the same pumps, though, that ended up with 7
3 to 800 recalls?

4 A. Yeah. That was the issue here. It wasn't like Martin
09:16:15 5 said, it wasn't 7 to 800. I can explain what the difference
6 in the numbers come from.

7 Q. The 7 to 800 is what you testified to, correct?

8 A. That's correct.

9 Q. Right?

09:16:23 10 A. Yeah.

11 Q. Okay.

12 A. We ended up doing more than necessary because we
13 didn't know exactly where the cut off on the sale numbers
14 was, so.

09:16:30 15 Q. All of them had that quad ring, right?

16 A. Yeah, Martin testified that only the first 500 had
17 quad ring. However, we replace more in the field. So we
18 probably replaced some that were not necessary.

19 Q. You recalled at least 7 to 800 pumps?

20 A. No, we did not recall the pumps. I explained that
21 very clearly already before, but if you want, I can do it
22 again. We basically would switch pumps out when necessary.
23 A lot of customers, we would send them a piston or an O-ring
24 that they want to get into, like Bill from Fuel Systems, for
09:17:05 25 example. He went in, and he took the pumps apart and

Eissis - Cross

1 repaired it on the spot in the weekend for the customers.

2 Another customer wouldn't want to do that, then we would

3 swap a pump out, and we would take a pump back and clean it

4 up and make it ready to be used for somebody else.

09:17:21 5 **Q.** 299 of your hearing testimony and date of that is just
6 about a year ago.

7 **A.** Yeah.

8 **Q.** "Question: So you didn't do" -- Line 1, "Oh. So you
9 didn't do any test on the grease in the field before you
09:17:35 10 made claims about its quality, right?

11 "Answer: That is correct.

12 "Question: Okay. You do have a number of warranty
13 claims on your ALS system?

14 "Answer: Yes, we do.

09:17:45 15 "Question: I believe you told me about 7 or 800 pumps
16 have been recalled thus far?

17 "Answer: Yes, we had to recall a pump, correct.

18 "Question: Seven to 800 of them, right?

19 "Answer: Yeah, that's about it approximately --
09:18:04 20 that's about approximately it, yeah, correct."

21 I read that correctly?

22 **A.** I think it's very similar to what I just told you.

23 **Q.** So you did no independent tests on the Lubecore grease
24 either before putting that in the market and telling people
09:18:22 25 to use it in their existing Groeneveld systems?

Eissis - Cross

1 MR. ANASTOS: Objection.

2 THE COURT: Overruled.

3 BY MS. MICHELSON:

4 Q. You may answer the question.

09:18:31 5 A. Okay. Can you please repeat what it was?

6 Q. I can.

7 A. Please do.

8 Q. I will. So you did no independent testing on the
9 Lubecore grease either before making claims about its
09:18:43 10 quality, did you?

11 A. Grease is very -- has very specific specifications and
12 we did not field test the grease before we sold it. That's
13 correct.

14 Q. And you did not evaluate independently anybody else's
09:18:56 15 tests on the Lubecore grease before release -- making claims
16 about its quality to the market, right?

17 A. Like buying gasoline in a store. Sales like octane
18 89. I'm not doing an octane test when I buy gas.
19 Specifications for the grease, Timken okay load, full layer,
09:19:17 20 base or viscosity. When a company that's -- makes grease
21 everyday tells me this is what's in the grease, I indeed did
22 not do any further independent testing to verify whether
23 those specifications that they gave me are correct. It's
24 my --

09:19:31 25 Q. You put your label on it and you released it to the

Eissis - Cross

1 market, right?

2 **A.** That's correct.

3 **Q.** Okay.

4 And you did so and told people if they use it in the
09:19:42 5 Groeneveld system, you would also warrant those products,
6 right?

7 **A.** When they use the Steadylube grease in the Groeneveld
8 system and they have an extended warranty program, we'll
9 honor that. Correct, yeah.

09:21:10 10 **Q.** Showing you what we've marked as Plaintiff's Exhibit
11 61-2, this is a pump that's a Lubecore reservoir or at least
12 a reservoir with the Lubecore labeling, and a Groeneveld
13 base, correct?

14 **A.** That's correct.

09:21:40 15 **Q.** Exhibit 55, that's an installed Lubecore pump?

16 **A.** Correct.

17 **Q.** Exhibit 60-1 and 60-2, that's an installed Lubecore
18 pump?

19 **A.** This one here, yes. The other one, can you show me
09:22:10 20 that again?

21 **Q.** Sure. It's -- I think it's the same but different
22 angles.

23 **A.** Okay. Good enough. They're both Lubecore pumps?

24 **Q.** Yes, sir.

09:22:17 25 **A.** Yes.

Eissis - Cross

1 **Q.** Sorry, I just need to see something for one minute.

2 So, sir, when we asked you in the case for Lubecore
3 financial information long, long ago, you finally gave us
4 something during your deposition. Do you recall that?

09:23:43 5 **A.** I don't recall it, but if you show me, then we can
6 take a look at that.

7 **Q.** Okay. This is what was handed to me right before
8 your -- or in the middle of your deposition. We've marked
9 it Exhibit 103. Do you recognize this?

09:23:58 10 **A.** Yeah, I recognize this document, yeah.

11 **Q.** And this is what you handed us?

12 **A.** Actually, Pierre LaBelle of our company made that.

13 **Q.** You did not make this, create this document?

14 **A.** No, I did not.

09:24:13 15 **Q.** You did not verify any of the numbers?

16 **A.** Yeah, I would have.

17 **Q.** You did?

18 **A.** Yeah.

19 **Q.** And this indicates that it's 2010 sales figures, year
09:24:27 20 to date, as of the date of your deposition which was
September of 2010, and then what you projected for the rest
21 of 2010?

22 **A.** Says from the top 2010 sales, year to date, and then
23 2010 sales projections, what date was this given? Can you
24 tell me?
09:24:50 25

Eissis - Cross

1 Q. What date did we give you this? On September 20,
2 2011?

3 **A.** September 20th.

4 MR. ANASTOS: That's --

09:25:02 5 MS. MICHELSON: 20 or 21st, 20th, 2010, sorry.

6 THE WITNESS: September 20, 2010, we gave you
7 this. Okay.

8 Q. Okay.

9 **A.** Yeah, and there was no backup, no support, no
10 supporting documentation, no financial records, nothing like
11 that, just this summary, right?

12 MR. ANASTOS: Objection.

13 THE COURT: Sustained.

14 Q. When you handed this to us, you didn't give me anyone
09:25:22 15 else, did you?

16 MR. ANASTOS: Objection.

17 THE COURT: The objection was sustained.

18 Q. And these were your projections and your sales
19 figures, Lubecore's?

09:25:32 20 A. Projections would be, more or less, by Pierre and
21 myself. I would have to look at it, yeah.

22 Q. Okay. And there's nothing about 2009 on there at all,
23 correct?

A. That's correct.

09:25:45 25 Q. Are any 2009 sales reflected in this document, not

Eissis - Cross

1 withstanding the dates here, the 2010 and 2011 dates?

2 **A.** I think that in this document, from a reason, there's
3 no 2009 figures.

4 **Q.** I didn't really hear what you said.

09:26:14 5 **A.** It appears there's no 2009 figures.

6 **Q.** That's not my question. It does appear there are no
7 2009 figure, but I want to clear this up because there was a
8 suggestion that maybe there were. Are there any 2009 sales
9 figures in this document, Exhibit 103?

09:26:31 10 **A.** Can I see it here? Because it's a little fuzzy to
11 read.

12 MS. MICHELSON: Yeah, can we give him another
13 copy? You can leave this here.

14 THE WITNESS: There's the green one we looked
09:26:46 15 at yesterday that looks a lot like it.

16 MR. KUNSELMAN: May I, your Honor?

17 THE COURT: Sure.

18 THE WITNESS: Okay. Okay. Okay.

19 Now, I understand. I think there's a typo here. Can
09:27:14 20 you go back to the other one?

21 **Q.** This is the same thing, just has my handwritten notes
22 from Gail's testimony on it. But, it's the same document,
23 Exhibit 103. Are there 2009 numbers reflected in here,
24 despite the dates or the dates here, correct?

09:27:29 25 **A.** Yeah, I think what the issue here is that the 2010

Eissis - Cross

1 year to date is actually probably the 2009 sales and the
2 2010. I think it's a typo. Says 2010 year to date. That
3 might be the 2009, and then 2010 projected annual, that
4 would make sense then and 2011 projected annual. So it's
09:27:57 5 possible that 2010 sales year to date, there's a typo in the
6 top there, but I would have to verify that.

7 Q. So is there a typo or not, is it --

8 A. I would now have to go back because it seems that if
9 you ask me for numbers in 2010, that that was correct,
09:28:16 10 right? That we would have the 2009 numbers. So in
11 September, it would seem logical to me that the 2010 sales
12 year to date, that should be 2009 or something, 2009, 384,
13 and then the --

14 Q. I'm just trying to figure out if -- it's your
09:28:38 15 testimony now that this column where it says 2010 sales year
16 to date should have said 2009, that this column, 2010 sales
17 projected annual should have been full 2010, and the 2011
18 sales projected annual are your projections for 2011? I
19 just want to know if this column here, 1, 2, 3, 4, 5, this
09:29:09 20 column pertains to 2009 sales because there was a suggestion
21 in the earlier testimony that it did, and that there was a
22 problem with Groeneveld calculating their damages based on
23 this being 2010 sales. And I want to -- I'm just asking.

24 MR. ANASTOS: Objection.

09:29:29 25 THE COURT: Objection sustained.

Eissis - Cross

1 **Q.** Are these -- is this supposed to be for 2009 or is it
2 2010?

3 **A.** You know, I am confused right now. I would really
4 have to go back to the bookkeeping and get this verified
09:29:42 5 because I'm confused at this point.

6 **Q.** Okay. Well, the issue actually --

7 **A.** So I cannot answer that question.

8 **Q.** Okay. The issue actually came up at your deposition,
9 and we'll refresh your recollection if I read your testimony
09:29:58 10 about this. Because I asked you about it, and you -- you
11 said there was no typo.

12 **A.** Okay. Then -- when was the deposition?

13 **Q.** September 20, 2010. I'm going to hand you a document
14 that was handed to me this morning for the first time. It's
09:30:17 15 Exhibit 23. That's what we marked it during your
16 deposition. Can you please tell us what that is? This is
17 Lubecore International, Inc. 2010, USA, actual sales in 2011
18 sales projections. Okay. Who created this document, Pierre
19 LaBelle.

09:30:36 20 So Lubecore did -- your company produced this
21 document?

22 "Answer: Yeah.

23 "Question: And what is -- what is this, are these the
24 different distributors in the U.S. that are identified here?

09:30:49 25 "Answer: Yeah, that's correct.

Eissis - Cross

1 "Question: Okay. There might be -- this is my
2 question to you during your deposition, okay, there might be
3 a typo here, but this is 2010 sales, there are two columns
4 for 2010 sales, maybe it isn't a typo. I don't really
09:31:04 5 understand what these columns mean. Can you explain the
6 differences?

7 "Answer: Yeah, the 2000 -- 2010 sales would be year
8 to date. Yeah, so it -- so it says year to date below that.
9 Uh-huh, I say.

09:31:24 10 "Answer: Year to date."

11 So that means until this was taken, until this moment
12 in time, so by now it would be accurate if taken as of last
13 week. Okay. Then we move on.

14 Then there's the 2010 sales, this is your answer,
09:31:42 15 "2010 sales so what we project to do for the end of the
16 year."

17 Does this refresh your recollection that there's no
18 typo on this document?

19 **A.** Actually, you know what? It doesn't refresh my
09:31:52 20 recollection at all.

21 **Q.** Do you recall testifying during your deposition that
22 there was no typo and that there were no 2009 sales on the
23 summary that Lubecore provided at your deposition? Did you
24 testify that late in your degrees?

09:32:10 25 **A.** Can I see the deposition myself? Can I read it?

Eissis - Cross

1 Q. I just read it, but we can do it again. Maybe we
2 should get bigger so people can read it this way.

3 "Question: Okay. Page 237, I'm going to hand you a
4 document that was handed to me this morning.

09:32:48 5 "Answer: Okay.

6 "Question: For the very first time it's Exhibit 23?

7 "Answer: Okay.

8 "Question: Can you please tell us what this is?"

9 A. This is the one you gave me, is 103.

09:32:59 10 Q. Yeah. It's marked for trial as 103. At your
11 deposition, it was Exhibit 23.

12 And if you need to see your deposition exhibit with
13 the sticker on it that says 23 --

14 A. Yeah, I'd like to see that.

09:33:12 15 Q. -- I can bring that up, too.

16 A. I'd like to see that.

17 MS. MICHELSON: Can you get that for me,
18 somebody? But, I'll keep going so we don't interrupt.

19 THE WITNESS: Actually, I would first like to
20 see that.

21 Can I get maybe get a bit of water? My mouth is
22 getting quite dry. I have a bottle of water in my bag
23 there, Tom.

24 MS. MICHELSON: Counsel, will you stipulate
09:34:29 25 that this is what the document was marked, Exhibit 23,

Eissis - Cross

1 during the witness' deposition.

2 MS. ZUJKOWSKI: Yeah, we'll stipulate it's the
3 exact same document.

4 MS. MICHELSON: Will you stipulate it was part
09:34:50 5 of Lubecore's document production, please?

6 MS. ZUJKOWSKI: Yes, Debbie.

7 MS. MICHELSON: Thank you.

8 THE WITNESS: For what purpose?

9 MS. ZUJKOWSKI: Also stipulate to the typo.

09:35:02 10 MS. MICHELSON: There is no typo. There is
11 no -- all right. I'm going to read from here.

12 Q. Page 237, Line 16.

13 "Question: I'm going to hand you a document that was
14 handed to me this morning.

09:35:21 15 "Answer: Okay.

16 "Question: For the first time, it's Exhibit 23.

17 "Answer: Okay.

18 "Question: Can you please tell us what it is?

19 "Answer: This is Lubecore International Inc.'s 2010
09:35:33 20 USA actual sales and 2011 sales?

21 "Question: Okay. Who created this document?

22 "Answer: Pierre LaBelle.

23 "Question: So lube -- from -- so Lubecore did,
24 Lubecore your company, produced this document?

09:35:53 25 "Answer: Yeah.

Eissis - Cross

1 "Question: And what is -- what is -- are these the
2 different distributors in the U.S. that are identified here?

3 "Answer: Yeah, that's correct.

4 "Question: Okay. And then -- and there might be a
09:36:11 5 typo here, but this is 2010 sales. There are two columns,
6 two columns for 2010 sales. Maybe it isn't a typo. I don't
7 really understand what those columns mean. Can you explain
8 the differences?

9 "Answer: Yeah, yes. The 2010 sales would be the year
09:36:34 10 to date. Yeah, so it says year to date below that. Can you
11 read that?

12 "Question: And I say uh-huh and you say --

13 "Answer: Year to date. So that means until this was
14 taken, the moment in time. So by now, it will be accurate
09:36:53 15 if it was taken last week. The next --

16 "Question: Wait. What did you just -- this was
17 created last week?

18 "Answer: Yeah. This would have been created whenever
19 it was created by Pierre.

09:37:08 20 "Question: Well, I'm asking you when was it created
21 by Pierre?

22 "Answer: Within the last few weeks.

23 "Question: Created within what? I had trouble
24 hearing, understanding you during the --

09:37:20 25 "Answer: The last few weeks.

Eissis - Cross

1 "Question: The last few weeks?

2 "Answer: I've been on the road. I do not know
3 exactly when Pierre created it. Then there's the 2010
4 sales. So what we project to do for the end of the year,
09:37:34 5 the 2010 projections. So the --

6 "Question: So the year to date sales will be current
7 through -- what month is this, is this September? So what?

8 "Answer: Probably August or so.

9 "Question: The end of --

09:37:51 10 "Answer: End of August, probably, probably, yeah.

11 "Question: And that's gross sales of \$384 and change?

12 "Answer: Correct, yeah, correct.

13 "Question: And you think between September and the
14 end of the year -- and we were in 2010 at the time?

09:38:09 15 "Answer: We're going to bring that to a million,
16 yes."

17 That was your answer. I read that correctly?

18 **A.** Actually that's quite helpful. That refreshes my
19 memory.

09:38:21 20 **Q.** Right. So there are no 2009 sales figures in Exhibit
21 103?

22 **A.** I think -- I think that is correct, yeah.

23 **Q.** Okay. And then no additional financial information
24 from Lubecore was provided until I guess a day and a half
09:38:44 25 before trial, right?

Eissis - Cross

1 **A.** I think my lawyers could answer that better.

2 **Q.** And this was what was provided in your exhibit book,
3 what's marked DX-X, meaning Defendant's Exhibit X-1, 2, 3,
4 correct? This comes from your Exhibit book, right?

09:39:20 5 **A.** That's possible. I mean -- I have -- I've never gone
6 through the exhibit book, but I'm sure --

7 MS. MICHELSON: Counsel, will you stipulate
8 that this was in your exhibit book provided to us two days
9 before trial?

09:39:34 10 MS. ZUJKOWSKI: We'll stipulate that it was in
11 our exhibit book. I think you're wrong on the date
12 actually. But, we're looking for the transmittal e-mail if
13 you need it. I don't see how it's relevant.

14 MS. MICHELSON: It appeared in the exhibit
09:39:44 15 book. All right.

16 BY MS. MICHELSON:

17 **Q.** And these figures are not the same as those in Exhibit
18 103, right?

19 **A.** Put it beside them so I can answer that. I couldn't
09:40:02 20 see as quick as you went so --

21 **Q.** The numbers in Exhibit 103 in your exhibit book are
22 not the same as those in Exhibit -- sorry.

23 **A.** I'm staring at a blank paining here.

24 **Q.** I'm just asking you if you know.

09:40:25 25 **A.** Actually I'm staring at a blank page. If you could

Eissis - Cross

1 show me both beside each other, I can take a look and see if
2 they're the same or not.

3 Q. You testified about it on direct exam. I'm just
4 asking you.

09:40:37 5 A. Show me that.

6 Q. I'm just -- I'll -- I'll show you in a minute if I
7 decide to do that. But, I'm just asking you your sales
8 figures in Defense Exhibit X are not the same as the numbers
9 in Plaintiff's Exhibit 103, right?

09:40:53 10 A. Actually, I'm looking at a blank page and I do not
11 know without seeing those pieces of paper in front of me. I
12 cannot answer your question. I'm sorry. I'm looking at a
13 white piece of paper.

14 Q. I heard you say that. You did not prepare Defense
09:41:18 15 Exhibit X?

16 A. What is Defense Exhibit X? Actually I can't read the
17 numbers either right now. It's very blurry. No, I did not
18 prepare this myself. That's correct.

19 Q. There are no financial statements attached to Defense
09:41:38 20 Exhibit X, right?

21 A. That's correct.

22 Q. There are no tax returns attached to Defense Exhibit
23 X, correct?

24 A. That seems to be correct, yeah. I don't know whether
09:41:52 25 they were or not, but -- it wouldn't make any sense that the

Eissis - Cross

1 tax returns -- because we're Canadian company and this is
2 only about business in the U.S., so this would have to be
3 singled out as U.S. sales only, like we're talking about
4 U.S. sales.

09:42:16 5 Q. Are you -- did you just say that your tax --

6 A. Financial activities in the U.S. So my tax returns
7 would not have separate columns in there about activity in
8 the USA. It would just be total revenue that we sent to
9 revenue Canada that would have no impact on activity in the
09:42:34 10 USA.

11 Q. There are no financial statements attached to the
12 document, right?

13 MR. ANASTOS: Objection.

14 THE WITNESS: That's correct, yeah.

09:42:40 15 THE COURT: We've gone over this.

16 MS. MICHELSON: Okay. I just have --

17 Q. I just have to ask you a couple questions more about
18 this document, Defendant's Exhibit X, and I'll wrap up soon.
19 You claim all of these figures here in this Exhibit X relate
20 to the sales of your single-line zero grease EP-0 ALS
21 products?

22 A. Can you move the page over a little bit? Just give me
23 the page so I can take a look at it so I can see the whole
24 thing all at once.

09:43:50 25 Q. We can do both. Do we have an extra copy for him to

Eissis - Cross

1 look on at the stand? Can somebody bring to him, please?

2 **A.** Now, I can't read it, yeah.

3 **Q.** We want the jurors to see it as well.

4 **A.** I can't read those numbers.

09:44:01 5 **Q.** We're going to bring a copy so you'll have it in your
6 hand.

7 MR. KUNSELMAN: May I, your Honor?

8 THE WITNESS: Okay.

9 **Q.** Here's my question. My question is --

09:44:16 10 **A.** Page DX-X.

11 **Q.** You claim all of these figures in DX-X relate to sales
12 of your single-line zero grease EP-0 ALS products, right?

13 **A.** 2009 to 2010 financials summary 2009 to 11. Total
14 revenue. Yeah, I believe that this is -- oh, yeah for sure.
09:44:54 15 Yeah, the sales here, revenue EP-0 single-line, the fourth
16 column over, yeah.

17 **Q.** Okay.

18 Lubecore also sells related products to the same
19 customer -- are you with me?

09:45:09 20 **A.** Yeah.

21 **Q.** I'm not going to ask the document right now.

22 **A.** Excuse me?

23 **Q.** Are you with me?

24 **A.** Yes, I'm listening.

09:45:16 25 **Q.** Okay.

Eissis - Cross

1 **A.** You're asking questions.

2 **Q.** Lubecore also sales related products to the same
3 customers that it sells these EP-0 products to, right?

4 **A.** What do you mean related products?

09:45:28 5 **Q.** Related -- other ALS products?

6 **A.** Yes, we do, yeah.

7 **Q.** Okay. And there's no indication in Defense Exhibit X
8 that anyone to whom you sold the related products are not
9 also Groeneveld customers, right? There's no indication in
10 this document to the effect I just described, is there?

11 MR. ANASTOS: Objection. Not Groeneveld
12 customers? I didn't understand.

13 THE COURT: I didn't understand it either.

14 MS. MICHELSON: I can rephrase it. I'm
15 trying.

16 BY MS. MICHELSON:

17 **Q.** There's no indication in the exhibit that anyone to
18 whom you sell EP-0 products are not also Groeneveld
19 customers, is there?

09:46:15 20 MR. ANASTOS: Objection.

21 THE COURT: Sustained.

22 **Q.** You don't dispute that people to whom you -- Lubecore
23 sells EP-0 products have also have been or are Groeneveld
24 customers, do you? You don't dispute that, do you?

09:46:29 25 **A.** Actually, can you please tell me what you'd like to

Eissis - Cross

1 know instead of going so difficult? Like -- what would you
2 like to know?

3 Q. You admit that Lubecore customers of EP-0 products are
4 also Groeneveld customers of the same line of products?

09:46:52 5 A. The list of distributors that we have on here, on
6 this -- these people, I thought there was one earlier, yeah
7 on this document here. These people bought automatic
8 greasing systems from me.

9 Q. And from Groeneveld, and from Groeneveld, correct?

09:47:07 10 A. Not all of them, but --

11 Q. And from Groeneveld, right?

12 A. Some of these people buy -- well, some of these people
13 used to buy, maybe still buy some parts from Groeneveld
14 today, but some of these -- I sell greasing systems to those
09:47:21 15 companies there, except for Frank's. Only got a demo once
16 and so --

17 Q. And the end users of Lubecore's EP-0 products are --
18 it's the same target as Groeneveld?

19 MR. ANASTOS: Objection.

09:47:38 20 THE COURT: Overruled.

21 THE WITNESS: So you're -- first you ask me
22 about these customers.

23 Q. It's another question. It's a different question.

24 A. You're talking about two different customers. The
09:47:47 25 first question was --

Eissis - Cross

1 **Q.** I know I am.

2 **A.** The first customer -- well, it's very unclear to me
3 the way you ask your question. Okay? The way you ask your
4 question. These customers here are people that are
09:47:57 5 distributors that I sell to, and those people sell to other
6 people again that I don't sell to, and I have some knowledge
7 of, but I don't know their customer base. I don't know
8 Bill's customers. I know a few of them, but that's about
9 it. So --

09:48:12 10 **Q.** Well, you told us already you know about at least
11 Millis Transport, and they were -- so the question -- this
12 is my question to you.

13 **A.** Yeah.

14 **Q.** You don't dispute that end users of your products,
09:48:23 15 your EP-0 products, are also end users of Groeneveld's
16 similar products, right?

17 **A.** They can be, yeah.

18 **Q.** Okay.

19 **A.** Yeah.

09:48:32 20 **Q.** Okay.
21 Mr. Eissis, you testified quite a bit about the
22 technical aspects of the various -- of the -- well, the two,
23 ALS pumps, correct?

24 **A.** The technical aspect of --

09:49:04 25 **Q.** You testified about the technical parts of your pump.

Eissis - Cross

1 My question to you is this.

2 You instructed Martin Vermeulen to make a pump for
3 Lubecore, right?

4 **A.** Yeah.

09:49:18 5 **Q.** You told him to make a system for Lubecore, right?

6 **A.** Pardon me, yeah.

7 **Q.** Okay. You told him what you wanted, right?

8 **A.** I gave him the features that I wanted my pump to have,
9 correct.

09:49:36 10 **Q.** And you told him what you liked in the Groeneveld and
11 the few things that you wanted different, right?

12 **A.** I told him what I like about the Groeneveld pump and
13 other pumps in the industry as well.

14 **Q.** And the Lubecore pump doesn't look like the other
09:49:55 15 pumps in the industry, doesn't look like the Ecostar, does
16 it?

17 **A.** We went there yesterday. I -- I'm -- I'm testifying
18 that my -- that the Lubecore pump looks more like Groeneveld
19 pump than Ecostar pump looks like a Groeneveld pump or like
09:50:11 20 my pump.

21 **Q.** You agree that the Lubecore pump looks like the
22 Groeneveld?

23 **A.** Yes.

24 **Q.** Okay.

09:50:16 25 And that's okay with you because you know that

Eissis - Cross

1 Groeneveld has an international reputation for quality,
2 right?

3 MR. ANASTOS: Objection.

4 THE COURT: Objection sustained.

09:50:31 5 Q. You voiced no objection at any time to it looking so
6 similar to the Groeneveld pump, did you?

7 A. No, I didn't.

8 Q. You would not want your pump to look like a product
9 that had a bad reputation, right?

09:50:51 10 MR. ANASTOS: Objection.

11 THE COURT: Overruled.

12 THE WITNESS: See when you talk about a bad
13 reputation, it depends on who you talk to.

14 Q. Well, I'm talking to you. I'm asking you the
09:51:01 15 question. My question to you, Mr. Eissis?

16 THE COURT: Excuse me. Let him answer the
17 question.

18 MS. MICHELSON: Well --

19 THE WITNESS: When you talk to a customer that
09:51:08 20 have Groeneveld pumps fall off in front of the wheels and
21 drove over it and splatter it all over the road, Groeneveld
22 does not have a good reputation. So in a case like that,
23 you know, it's probably a disadvantage. In other
24 advantages -- other areas where they are happy with it, it
09:51:23 25 doesn't really matter. So really it can go both ways, also

Eissis - Cross

1 people that are not happy with the Groeneveld systems. So
2 it goes both ways.

3 Q. You would not want your pump to look like something
4 that had a bad reputation in the marketplace, would you?

09:51:46 5 A. Preferably not, no.

6 Q. And you say in your web site that you understand how
7 long it takes to build a reputation in the marketplace, 20
8 years to build a reputation and only five minutes to ruin
9 it, right?

09:52:01 10 A. Yeah, that's -- that's true.

11 Q. And you've testified that you wanted to forge an
12 independent corporate image and identity for Lubecore?

13 A. Yeah.

14 Q. And you -- and for that reason, you want your pump to
09:52:14 15 look distinctly different than the Groeneveld?

16 A. Can you show me where it says that?

17 Q. Can you say it now?

18 A. No, I'd like to show -- I'd like you to show me in
19 what context and where you find that information.

09:52:32 20 Q. So I'm asking you a question.

21 A. You're reading from something there and I like to know
22 where you read from.

23 Q. I am reading from my outline and I'm not going to show
24 that to you. My outline. I'm asking you the question. And
09:52:44 25 I can find the testimony if I need to but my question to you

Eissis - Cross

1 right now, sir, is --

2 **A.** You said something to the extent that I --

3 **Q.** And for that reason, you wanted your pump to look
4 distinctly different than the Groeneveld because you wanted
09:52:57 5 to build your own make and model and develop your own brand,
6 right?

7 **A.** I want to develop my own brand.

8 **Q.** And for that reason, you want your pump to look
9 distinctly different from the Groeneveld?

09:53:13 10 **A.** I do not understand where you're going with this.
11 Where are you getting this?

12 **Q.** Do you want it to look exactly the same as the
13 Groeneveld?

14 **A.** I never said it before. So show me where I said that.
09:53:22 15 You talk to me for ten hours, asked me thousands of
16 questions, if not 100,000. So if you say that I said that,
17 and I'd like to say when did I say that, verify that, yeah,
18 and what context is that and ask me a question.

19 **Q.** You wanted your pump to look just like Groeneveld's,
09:53:47 20 didn't you? You can't answer the question because you
21 wanted your pump to look exactly like Groeneveld?

22 MR. ANASTOS: Objection.

23 THE COURT: Overruled.

24 THE WITNESS: No. I did not instruct that my
09:53:58 25 pump had to look like a Groeneveld.

Eissis - Cross

1 **Q.** I didn't ask if you instructed that because you
2 certainly didn't instruct him to the contrary. My question
3 is you wanted your pump to look exactly like Groeneveld's,
4 didn't you, and that's why it does?

09:54:10 5 **A.** It doesn't matter to me.

6 **Q.** Well, it would matter to you. We just established if
7 Groeneveld had a crummy reputation, it would matter to you
8 then, wouldn't it? You just said it would? You just said
9 that?

09:54:26 10 **A.** Yeah, that's correct, I said that.

11 **Q.** Okay. So it does matter to you, doesn't it?

12 **A.** Yeah, if it would look like -- the Groeneveld pump had
13 a really bad reputation, I would not like that, correct.

14 **Q.** You know they have a good reputation. You carried
09:54:42 15 that product line from 1988 to 2007, right? You know they
16 have a good reputation?

17 **A.** Yeah, different versions of it, I did, yeah.

18 **Q.** You know that they're recognized in all over the place
19 among people who were involved in the ALS industry? You
09:55:00 20 know that, don't you?

21 **A.** Yeah, Groeneveld is recognized in -- you know,
22 especially with the customers, yeah.

23 **Q.** You can -- you can identify a pump as a Groeneveld by
24 the shape of it, can't you? You worked with the thing for
09:55:17 25 all those years, you can identify it, you recognize it as a

Eissis - Cross

1 Groeneveld when you see it, right?

2 **A.** Yes, I do.

3 **Q.** Because of the shape of it, right, the silhouette, the
4 outline, the way it looks, you recognize it on sight?

09:55:31 5 **A.** And also because the name and the labeling on it.

6 **Q.** Is it your testimony here in court that you would not
7 recognize that as a Groeneveld pump if you couldn't read the
8 label that says Groeneveld?

9 **A.** Drove by it 100 kilometers an hour on the highway,
09:55:46 10 yeah. Actually, I would still say it's a Lubecore pump,
11 yeah, because of the red colors.

12 **Q.** So, sir, you wanted it to look like the Groeneveld
13 because you knew about Groeneveld's reputation, market
14 presence, and place in the industry, didn't you?

09:56:07 15 **A.** I have no objection with it looking like a Groeneveld.

16 **Q.** In fact, you like that, and you like enjoying the
17 benefits of that, don't you?

18 **A.** It's a good pump.

19 **Q.** Otherwise, you would make it differently, wouldn't
09:56:22 20 you?

21 **A.** It would have been up to Martin.

22 MS. MICHELSON: I have nothing further at this
23 time.

24 THE COURT: Any redirect?

09:56:36 25 MR. ANASTOS: We have no questions for

Eissis - Cross

1 Mr. Eissis.

2 THE COURT: Thank you, Mr. Eissis. You can
3 step down. You may call your next witness.

4 MR. ANASTOS: Your Honor.

09:56:54 5 THE COURT: Sure.

6 MR. ANASTOS: We're only calling the witness
7 to authenticate the trade registration form pulled off the
8 Internet. If there's no dispute about the authentication
9 then we don't have to call this witness.

09:57:06 10 MS. MICHELSON: I mean I'm happy to talk to
11 this person and see if I have any issue.

12 THE COURT: Here, take a minute. You want to
13 stand up and stretch, be my guest.

14 (Counsel conferring.)

10:01:03 15 THE COURT: You should take a break since they
16 took a break you might as well.

17 A JUROR: Amen.

18 THE COURT: Chris will take you in.

19 (Thereupon, a recess was taken.)

10:17:59 20 THE COURT: Go ahead.

21 MR. ANASTOS: Lubecore calls Ms. Susan Coker.
22 Step over here if you will. Raise your right hand for me.

23

24

25

Coker - Direct

1 SUSAN COKER,
2 of lawful age, a witness called by the DEFENSE,
3 being first duly sworn, was examined
4 and testified as follows:

10:18:28 5 DIRECT EXAMINATION OF SUSAN COKER

6 THE COURT: Could you tell us your full name
7 and spell your last name.

8 THE WITNESS: My full name is Susan
9 Draeger-Coker, C-O-K-E-R.

10:18:36 10 THE COURT: Thank you.

11 BY MR. ANASTOS:

12 Q. Good morning, Ms. Coker.

13 A. Good morning.

14 Q. Ms. Coker what is your occupation?

10:18:42 15 A. I'm a paralegal.

16 Q. How long have you been a paralegal?

17 A. Going on 25 years.

18 Q. Where are you currently employed?

19 A. Ulmer and Berne.

20 Q. And you work with me at Ulmer and Berne?

21 A. Yes, I work in the department that you are in.

22 Q. Which is the business litigation department?

23 A. Yes, and I also assist occasionally on intellectual
24 property matters.

10:19:04 25 MR. ANASTOS: Can we have the screen, your

Coker - Direct

1 Honor?

2 Q. Ms. Er, I've got on the screen document in this case
3 that's been marked as Defendant's Exhibit Z?

4 THE COURT: Speak up a little bit.

10:19:26 5 Q. I have on the screen document that's been marked as
6 Defendant's Exhibit Z, do you see that. Z as in zebra?

7 A. Yes.

8 Q. Are you familiar with this document?

9 A. Yes.

10:19:34 10 Q. Did I ask you to find this document?

11 A. Yes, you did.

12 Q. What did you do?

13 A. I went on the web site for the -- it's called WIPO,
14 it's the World Intellectual Property Organization, and from
15 there, you can search for various trademarks in multiple
16 countries in the world, and that search led me to the
17 Benelux Office of Intellectual Property, and that would be
18 Belgium, Belgium, the Netherlands, and Luxembourg, and at
19 their web site, I did a web search for Lubecore, and came up
20 with this finding.

21 Q. And then you printed it out?

22 A. Printed it out, e-mailed it to you.

23 Q. Do you have any dispute that the document you're
24 looking at is the document you e-mailed to me?

10:20:29 25 A. No.

Coker - Cross

1 MR. ANASTOS: No further questions.

2 THE COURT: Thank you. Cross-examination?

3 MS. MICHELSON: Very quickly. Your Honor,
4 thank you.

10:20:43 5 CROSS-EXAMINATION OF SUSAN COKER

6 BY MS. MICHELSON:

7 Q. Hi. How are you, Ms. Coker?

8 A. Good.

9 Q. Ms. Coker, you have no personal knowledge as to why
10:20:52 10 this registration was made, the one that's in the exhibit?

11 A. No, ma'am.

12 Q. And you have no knowledge of the lawfulness of the
13 registration under European laws or regulations, or those
14 that govern the three places?

10:21:08 15 MR. ANASTOS: Objection, beyond the scope.

16 THE COURT: Yeah, the objection is sustained.

17 Q. You did other searches as well for additional
18 information and this is the only thing you could find,
19 correct?

20 A. Correct.

21 MS. MICHELSON: Nothing further, your Honor.

22 THE COURT: Thank you. Ms. Coker, thank you
23 ma'am. That was easy, huh?

24 THE WITNESS: Yes, it was.

10:21:24 25 THE COURT: Your first time testifying.

1 THE WITNESS: Yes, sir.

2 THE COURT: In all those years.

3 THE WITNESS: Yes.

4 THE COURT: Wasn't so bad.

10:21:28 5 THE WITNESS: Usually I'm one of those people
6 out there, so.

7 (Laughter.)

8 THE COURT: All right. Thanks. Anything
9 further?

10:21:34 10 MR. ANASTOS: Your Honor, we have no more
11 witnesses at this time. We'll be prepared to move our
12 exhibits.

13 THE COURT: Okay. The Defense has rested. Is
14 there anything further on behalf of the Plaintiff?

10:21:41 15 MS. MICHELSON: There is going to be, your
16 Honor. Yes, our -- we have a rebuttal witness that is due
17 to be here I think around 1:15 or so.

18 THE COURT: Looks like we missed him.

19 MR. ANASTOS: Dr. Rashidi. This is the
10:21:55 20 Cleveland State University guy.

21 THE COURT: Hang on. We'll -- since they
22 rested, we'll take our -- I say short, but you know what
23 that means now, I'm sure. Don't you? When I say short,
24 like a lawyer, I just have two questions and an hour later,
10:22:08 25 you're going what. Okay.

1 We'll have a short recess because they rested. We'll
2 go through their exhibits a little bit, and we'll be ready
3 to go to conclude the case and you'll be getting it fairly
4 quickly. So keep in mind the admonition. It's still
10:22:21 5 important. You may or may not have heard all the testimony
6 you're going to hear. Fair enough? Okay. Chris, could you
7 take them back.

8 (Proceedings in the absence of the jury:)

9 THE COURT: Okay. What about this witness?

10:23:06 10 MR. ANASTOS: I believe he's being called as a
11 rebuttal expert under Rule 26, and we didn't put any expert
12 on.

13 MS. MICHELSON: He's been called -- is an
14 expert, and he's being called to rebut testimony that was
10:23:17 15 put in in the Defense's case-in-chief of Mr. Eissis and also
16 of Mr. Vermeulen, who was -- whose testimony was presented
17 on functionality issues and technical issues, and he speaks
18 to all of those, including frankly, your Honor,
19 Mr. Vermeulen's lack of basic knowledge that would have --
20 his demonstration of a lack of basic knowledge about
21 engineering principles, such that there's no way he even
22 designed the Lubecore pump.

23 MR. ANASTOS: These questions --

24 MS. MICHELSON: More as well, your Honor, but
10:23:58 25 given that they've -- they've offered -- they've offered

1 expert like testimony through Mr. Vermeulen. And it is
2 appropriate for -- and we are seeking in a rebuttal case to
3 demonstrate that the expert opinions and knowledge and
4 testimony or the expert like testimony offered by
10:24:23 5 Mr. Vermeulen should be -- should be considered in the --
6 should be evaluated with Dr. Rashidi's input. They put him
7 on as their expert like person on these issues to talk about
8 functionality and all sorts of things, and Dr. Rashidi is
9 prepared to discuss it. We did have him promptly prepare a
10:24:50 10 report. As soon as we got the testimony with Mr. Vermeulen
11 in the deposition, which was on a Tuesday, we -- we got
12 doctor -- because we didn't know what he was going to say
13 before. We got Dr. Rashidi on board to evaluate the
14 testimony. When the transcript became available, we ordered
10:25:09 15 it expedited for that purpose and provided them a report, I
16 believe on the Sunday, and they've had it since then, and
17 that is our intent.

18 THE COURT: So he can testify as to the
19 Groeneveld product because that's at issue in the case,
20 isn't it? Whether the Groeneveld product is functional or
21 not, not whether Lubecore is functional or nonfunctional,
22 right?

23 MS. MICHELSON: He testified --

24 THE COURT: Could you answer my question?

10:25:37 25 MS. MICHELSON: Okay.

1 THE COURT: Isn't that the issue in the case?

2 MS. MICHELSON: Yeah, it's one of them, yes.

3 THE COURT: Okay.

4 MS. MICHELSON: On functionality, yes.

10:25:46 5 THE COURT: Of the Lubecore pump -- excuse me,
6 of the Groeneveld pump, not Lubecore?

7 MS. MICHELSON: Right.

8 THE COURT: So is it -- how is it relevant
9 then? What are -- what is he going to testify about the
10 Lubecore?

11 MS. MICHELSON: Mr. Vermeulen gave lots of
12 testimony and says that he's the one who designed both
13 systems, created both systems independently, including that
14 he created the Lubecore independent of the Groeneveld, and
10:26:10 15 Dr. Rashidi says that is not possible. That is --

16 THE COURT: Okay.

17 MS. MICHELSON: -- discredits his testimony.

18 THE COURT: All right.

19 MR. ANASTOS: May I speak, your Honor?

10:26:21 20 THE COURT: Yeah.

21 MR. ANASTOS: First of all, one of the key
22 points is expert like. Secondly, Mr. Vermeulen testified
23 100 percent from his personal experience in terms of the
24 development of the pumps. If there was cross-examination
10:26:35 25 with respect to that issue, it should have been done during

1 cross-examination of Mr. Vermeulen. Thirdly, if they're
2 going to put on evidence of functionality at this point,
3 that should have been done in their case-in-chief. It's not
4 a rebuttal issue. It's an issue on which they had the
5 burden of proof to begin with.

6 THE COURT: No, I -- right. Is he going to
7 testify about the functionality of the Groeneveld pump?

8 MS. MICHELSON: No.

9 THE COURT: Okay.

10:26:59 10 MS. MICHELSON: His testimony is that --
11 well --

12 MR. ANASTOS: Going to discredit
13 Mr. Vermeulen's testimony.

14 THE COURT: Understand.

10:27:09 15 MS. MICHELSON: Your Honor, whether, whether
16 this is an intentional copy or not, whether it's a copy at
17 all, I mean they have said -- Lubecore has said that it is
18 not a copy, not a copy. It's not identical, not even an
19 intentional copy.

10:27:24 20 THE COURT: Your witness -- I actually wrote
21 it down. Mr. Wapenaar said, "I do not need to have 20/20
22 vision to see that there are differences."

23 MS. MICHELSON: For him because he, after he
24 studied it, he could see it.

THE COURT: He looked at it on the table.

1 That's what he was saying he looked at it on the table.

2 That's your guy.

3 MS. MICHELSON: Your Honor, also when he first
4 saw it and didn't know what was going on, he had a very
10:27:46 5 different reaction. Now, the Court a year or a year and a
6 half later, he can see --

7 THE COURT: The objection is sustained.

8 MS. MICHELSON: Well, I will -- I will just
9 proffer --

10:27:57 10 THE COURT: Okay.

11 MS. MICHELSON: -- his --

12 THE COURT: All right. Now, you have any
13 other motions?

14 MR. ANASTOS: I don't know if -- are there any
10:28:06 15 more witnesses?

16 THE COURT: You rested. So let's hear what
17 you have to say.

18 MR. ANASTOS: Yeah. I'd like to move my
19 exhibits first or --

10:28:11 20 THE COURT: You can do that, but you guys can
21 do that on your own. I'd like to listen to --

22 MR. ANASTOS: I absolutely renew the motion
23 for judgment, as a matter of law, upon the completion of the
24 whole case. Now, you may take into consideration, your
10:28:22 25 Honor, all the testimony that you've heard in this case,

1 Mr. Vermeulen's and Mr. Eissis', especially, in reaching a
2 determination that there's not enough evidence to go to the
3 jury on functionality, let alone any of the other issues.

4 Mr. Vermeulen testified and Mr. Eissis. They've
10:28:38 5 explained in detail how these pumps came about, what the
6 engineering principles are that go into their design, and
7 again, there's no basis that anybody could determine that
8 engineering necessity did not influence the design of the
9 Groeneveld pump. And there's also no basis for -- in the
10:28:56 10 Plaintiff's testimony for any conclusion that the design is
11 somehow arbitrary or fanciful or in any way not dictated by
12 engineering necessity.

13 THE COURT: How about the other counts? You
14 should talk at the podium, Tom, to make sure -- talk from
10:29:15 15 the podium to make sure that Shirle can get everything.

16 The second count.

17 MR. ANASTOS: The second count I believe is
18 for unfair competition, also in violation of 15 U.S.C.
19 1125(a). They would have to prove that the -- that we have
20 made false designations of origin, false or misleading
21 descriptions of fact or false or misleading representations
22 of fact, which is likely to cause confusion or uncertainty
23 or to cause mistake or to deceive as to either the
24 affiliation connection or association of --

10:30:13 25 THE COURT: Slow down, slow down.

1 MR. ANASTOS: Of Lubecore with Groeneveld or
2 as to the origin, sponsorship or approval of Lubecore's
3 goods, services, or commercial activities by Groeneveld.

4 There's been absolutely -- the same confusion issue
10:30:28 5 we're talking about with respect to the original trade dress
6 claim. There's no testimony whatsoever that anybody has
7 been deceived by anything we have, that Lubecore has done
8 with respect to the origin of the Lubecore pump. No
9 testimony that anybody has affiliated the Lubecore pump with
10:30:45 10 the Groeneveld pump, connected it with the Groeneveld pump,
11 associated it with the Groeneveld pump, or done anything
12 false or misleading in terms of unfair competition.

13 In terms of false designation of origin, false or
14 misleading descriptions of fact, I don't know what we're
10:31:02 15 going to hear on that. I suppose we're going to hear that
16 the O-ring in the product description that Mr. Eissis -- the
17 product comparison sheet that you saw of Mr. Eissis'
18 testimony compared an O-ring to a quad ring, and Lubecore no
19 longer uses the quad ring in its pump. It uses an O-ring,
20 and somehow that's false and misleading.

21 First of all, we have no idea. There was no date on
22 those things. We don't know when they happened. Second of
23 all, I don't believe that that's false and misleading and
24 sufficient to go to a jury.

10:31:35 25 And it wasn't -- the next claim for false advertising,

1 in violation of 15 U.S.C. 1125(a), I'm frankly not sure
2 there's been any evidence in this case whatsoever of
3 advertising that Lubecore does. The distribute -- the
4 brochures that are distributed at trade shows or the sales
10:31:57 5 material that are handed to prospective customers, I'm not
6 sure they even qualify as advertising in terms of
7 advertising to the public. There's been no evidence of
8 trade journals or anything where we have said anything.
9 That aside, I don't think there's any -- there was no
10:32:12 10 evidence in this case of any false or misleading statement.

11 The -- they're going to say that the next generation
12 of pumps is somehow false and misleading, and it's going to
13 be false or misleading because there was one greasy pump and
14 we had to do a recall. That's no basis for saying that a
10:32:29 15 slogan like next generation of automated lubrication systems
16 is somehow false or misleading. Mr. Eissis described
17 in minute detail the reasons he believes that the Lubecore
18 pump is, in fact, the next generation over all the competing
19 systems in the market today.

10:32:52 20 We have not made any -- there's no evidence that
21 Lubecore made any statements to deceive anyone. There's no
22 statements that it made any statements to -- material
23 statements that influence the -- a deceived customer's
24 purchasing decisions. And there is no evidence that if
10:33:15 25 there were any such statements, that there's some causal

1 link between those statements and any possible harm to
2 Groeneveld.

3 The next claim is under the deceptive trade practices,
4 in violation of the Ohio Revised Code. This is primarily
10:33:37 5 treated the same way as the Lanham Act. And for all the
6 reasons that we've stated already in terms of no evidence of
7 confusion, no evidence of any connection being tried to be
8 asserted between Groeneveld and Lubecore, and everything I
9 just said, there is insufficient evidence to go to the jury
10:33:57 10 on that point.

11 The next point for tortious interference with
12 contractual and business relationships. They have to prove
13 a contract, that Lubecore knew of the contract, that we
14 intentionally acted to procure the breach without
10:34:15 15 justification, and that Groeneveld was injured. There's
16 been no testimony in this case that we breached any --
17 caused anyone to breach a contract. The only thing they
18 could possibly be referring to would be their, Groeneveld's
19 relationship with Fuel Systems's, Inc., which there's no
10:34:34 20 distribution agreement. Somehow they're claiming there was
21 a 25-year oral distribution agreement which in a million
22 years couldn't be enforceable.

23 Mr. Koppelman, I believe, testified that he didn't
24 think he had any kind of a contract with Groeneveld. And
10:34:47 25 furthermore, Mr. Koppelman testified that he severed his

1 relationship with Groeneveld for his own business reasons,
2 and then started doing what -- doing business with Lubecore
3 independently.

4 I would also like to say that despite even if by some
10:35:09 5 chance any of these claims go to the jury on damages,
6 there's not a scintilla of evidence in the record to support
7 that any purchaser of a good from Lubecore has done so as a
8 result of any of the alleged conduct in violation of the
9 Lanham Act or the Ohio Deception Trade Act or unfair
10:35:40 10 competition under common law, whatever they have.

11 All they have is Lubecore made some sales, and they
12 want to say that all of those sales should be attributed to
13 Groeneveld as Dr. Burke testified, absent any proof that any
14 of those sales were made as a result of the infringing
10:36:00 15 activity. Their damages are zero.

16 And I submit that there has been zero evidence that
17 any sale has been made by Lubecore as a result of anything
18 that could be described as infringing activity. I go back
19 and, you know, renew. We could discuss, I suppose, forever
10:36:23 20 the original trade dress claim. I think your Honor kind of
21 hit it on the head with respect to what is the trade dress
22 of the pump, and as you heard in my opening, my belief is
23 that if there's any protectable trade dress on that thing,
24 it's the green label and that's all.

10:36:38 25 It's a functional piece of equipment. It does not

1 have any secondary meaning, and there's been absolutely no
2 zero testimony of any confusion in the marketplace as
3 between the origin of the Groeneveld pump and the origin of
4 the Lubecore pump. Thank you.

10:36:57 5 THE COURT: Thank you. Ms. Michelson.

6 MS. MICHELSON: Thanks.

7 MR. MILLER: First, Steve Miller for
8 Groeneveld for just a few moments. Ms. Michelson is better
9 equipped to argue the fine points of this, but you've asked
10 a question to which you've not received a full answer, and
11 Groeneveld wants you to have the full answer.

12 The question has to do with whether a Rule 50 motion,
13 giving all reasonable inferences in favor of the Plaintiff,
14 would be a proper outcome based on the evidence. Here's the
15 testimony from Willem.

16 THE COURT: From who?

17 MR. MILLER: Willem.

18 MS. MICHELSON: Van der Hulst.

19 MR. MILLER: Can I get the screen? I want to
20 show it to you. It's very easy to --

21 THE COURT: Took you guys 24 hours to find it.

22 MR. MILLER: It's either in the record or it's
23 not. Okay.

24 So remember we're dealing with a witness whose first
25 language is not English.

1 THE COURT: No, no, no, please. Steve,
2 please.

3 MR. MILLER: No problem, your Honor. Here's
4 what he testified.

10:38:16 5 "Why did you want to make your pump different looking
6 than everybody else's that was on the market? Yeah, it's
7 just a challenge. It's a challenge of designer, and each --
8 let's say you want to make something different than
9 everybody else. This is in -- yeah. You want to do that.
10:38:36 10 This is, I think everybody you want to do something
11 different than somebody else. So we want to give it a
12 groove look. So this has to be our pump for many, many
13 years and it has to be good and nice.

14 "Question: And was the Groeneveld EP-0 pump different
15 looking than everybody else's on the market?

16 "Answer: At that time, yes. Yes, of course.

17 "Question: Over the last 30 years, did anybody else's
18 pump look like Groeneveld's, other than what we have here on
19 the table now?

10:39:11 20 "Answer: No, no.

21 "Question: Did new products come on the market, ALS
22 pumps, over the last 30 years?

23 "Answer: Yes. There's a lot of product of
24 lubrication pumps. Your lubrication system, Japanese
10:39:25 25 Chinese, also Europe, different producers, smaller ones, but

1 they all have their one system -- their own system in a way,
2 and they all look different, all different."

3 Next.

4 "Question: Did Groeneveld have to make its pump look
10:39:43 5 this way on the outside because of the way it works on the
6 inside?

7 "Answer: No, no. Of course not. No, no.

8 "Question: Well, again, you say of course not --

9 "Answer: You can't -- the pump wasn't made in this
10:39:59 10 way, but you can put the valves inside. You can make out of
11 the pistons, horizontal or vertical, make it horizontal.
12 You can change the shape of the reservoir round. You can
13 make also reservoirs which are square so you can change very
14 easily the same pump if you thinking the same way.

10:40:23 15 "Further, yet, you can make it different, of course.
16 You can say, okay, reservoir I make -- you can make all in
17 plastic. Only inside you can make from aluminum. You can
18 make the cylinder where the piston is inside steel bushing
19 that you screw in and you see it. There are -- the pump is
10:40:43 20 different and in the end" -- and he refers to the Sterk pump
21 is different, but it do the same, meaning it do the same
22 thing.

23 Further, "Question: Could you today make this pump
24 look different and it would still work and function as part
10:40:59 25 of the ALS?

1 "Answer: Yes, of course.

2 "Question: Well explain how.

3 "Answer: It's not so difficult, so difficult. To
4 produce it later on, this is another story, but you can
10:41:13 5 make -- you can imagine everything. As I told, this piston
6 is a vertical piston. Lincoln United States producer has a
7 lot of horizontal pieces, and you can make the piston also
8 horizontal because the grease is not coming in the chamber
9 by gravity or whatever. When the piston goes back, it gives

10:41:35 10 the grease in the piston, and you can make it in this way.

11 So if the reservoir, the piston, poof, it's the same.

12 "Question: Does gravity have an impact on the way
13 your pump works?

14 "Answer: No, no nothing.

10:41:51 15 "Question: Does the follower plate have to be round
16 to function in the way that you described?

17 "Answer: No, of course not.

18 "Question: I know you said of course not. Can you
19 explain to the jury why not?

10:42:06 20 "Answer: Because -- because this is a round
21 reservoir, automatically the follower has to be round, but
22 you can make a square follow the square.

23 "Question: And if it's -- if it's an oval shape, is
24 that a possibility as well or --

10:42:24 25 "Answer: A round, of course, is the most easy shape.

1 This is more natural, but you can make different shapes, of
2 course.

3 "Question: Is it difficult to produce or more costly
4 to produce a square reservoir shape?

10:42:38 5 "Answer: To produce, no, because the amount of nylon
6 in the end makes the price of the reservoir then at the
7 bottom, the material has to be better than when you make it
8 round.

9 "Question: If you were making this pump today, would
10:42:56 10 you make it the same way and use the same materials?

11 "Answer: No, I will not make it the same way,
12 absolutely not.

13 "Question: So why is it Groeneveld still making the
14 pump, its own pump, exactly this way if it's harder and more
10:43:09 15 expensive to do so?

16 "Answer: Because it's our pump. We went to the
17 market with this pump. Everybody knows this pump. I make
18 already more than 650,000 of these pumps. Further, and it's
19 a very nice pump. As long as we sell it, we will keep it
20 probably. We will keep it probably. Yeah."

21 Next, "Question: Would you have wanted to design and
22 create and make something that looks like this?" Referring
23 to Exhibit 42, a different pump?

24 "Answer: No, they'd fire me probably.

10:43:44 25 "Question: And why? If it works, what does anybody

1 care what it looks like?

2 "Answer: You see nowadays, the cars, even trucks,
3 nowadays, a new truck is nicer than a personal car inside.
4 The shape on the cars, the wheels, the tire protection, the
10:44:02 5 tanks, the air tanks, it's unbelievably nice. Not only a
6 car would go from A to B, no, they want also to make
7 something nice. So when you put something on a chassis of
8 an owner of a truck with truck for a lot of money, he bought
9 all kinds of chrome, insulation, lights, and nice things and
10:44:23 10 then you put this on the chassis, it's terrible. Huh?"

11 Next, "Question: Referring to Exhibit 44, would you
12 want Groeneveld's product looking something like this one?

13 "Answer: No.

14 "Question: Why?

10:44:38 15 "Answer: Because we have another philosophy in
16 lubricating systems."

17 Further, "Answer: We make -- we make art impression
18 at that time. We make some sketches, how it would look
19 like. I think we made even another model to show the pump
10:44:53 20 to the people, to management, because there was money
21 involved. And we needed to show what we are going to do.
22 So they had an idea of the shape and the function is only --
23 yeah, telling how it will function. That's not too easy,
24 but the shape, we have to show it, yeah.

10:45:11 25 "Question: Does the shape or outline of the pump

1 affect the way the thing performs, the way it delivers
2 grease throughout the system?

3 "Answer: No.

4 "Question: Explain this to the jury. It might be
10:45:23 5 obvious, but I'm sorry. I'll ask you to explain.

6 "Answer: It's like a car. No? The car go from A to
7 B, and they're all different. The shape has nothing to do
8 with the function of the moving from A to B. And it's the
9 same as the lubrication system. The only thing we have to
10:45:40 10 do is create energy and that there is an outlet where grease
11 is coming out. How you do that? You can do it in many,
12 many, many ways."

13 Last one. Later, "Answer: The outside look is only
14 the look." And further, "So we have a lot of possibilities
10:45:59 15 to make the outside the same and the inside completely
16 different.

17 "Question: And are there a lot of possibilities to
18 make the inside the same and the outside completely
19 different?

20 "Answer: I think I already mentioned that. That's
21 possible, yes.

22 "Question: And I just -- is it more than just
23 possible? Is it -- how easy is it or how difficult is it to
24 do such a thing?

10:46:27 25 "Answer: It's not -- let's say not difficult for

1 someone -- not an expert and not working in this field,
2 probably it's very difficult, but we have a team. I have a
3 lot of nice, good, clever designers. And when I say
4 tomorrow okay, we are going to change this pump in another
10:46:45 5 shape, we can -- we will make a design and we will find it
6 out. Yeah."

7 I've only one comment about it. This is the evidence
8 from which a reasonable jury reasonably could infer that
9 that design which predated by a long shot the Lubecore
10:47:05 10 design that mimics, it was fully arbitrary and fanciful in
11 its silhouette appearance.

12 THE COURT: When you say silhouette, you're
13 talking about the base, the reservoir, the top, where the
14 plugs are? You're talking about all that?

10:47:23 15 MR. MILLER: Talking about the outline of the
16 total shape, and the answer is I believe Groeneveld's
17 position is that that excludes the label and the color; that
18 you could take any color you want and put it on the Eiffel
19 Tower, it's still going to be the Eiffel Tower, take any
20 label you want.

21 THE COURT: All right.

22 What evidence do you have that it's not -- the
23 reservoir is not functional?

24 MR. MILLER: Sorry. I didn't hear the first.
10:47:43 25 THE COURT: What evidence is there that the

1 reservoir is nonfunctional?

2 MR. MILLER: I didn't say the reservoir is
3 nonfunctional.

4 THE COURT: I am asking you. That's the test,
10:47:51 5 isn't it?

6 MR. MILLER: No, I don't believe that is the
7 test. I think the question is, is the totality of the trade
8 dress not nonfunctional or functional, and I believe --

9 THE COURT: Okay. And that one sentence where
10:48:01 10 he says that we just designed it this way and, ergo, it's
11 nonfunctional, that's what you say is the evidence?

12 MR. MILLER: No, not one sentence. It's all
13 these sentences, and all these sentences -- no. And all
14 these sentences taken together -- remember the Court's job
10:48:18 15 isn't to weigh which witnesses but --

16 THE COURT: You didn't have to tell me what my
17 job is.

18 MR. MILLER: Fair enough. All these sentences
19 taken together are a reasonable jury reasonably could
20 conclude either of two things. A reasonable jury could
21 conclude you know what; I think that cylinder is functional.
22 I think it grows organically out of the base.

23 THE COURT: No, that's being silly, Steve.
24 It's not -- they designed it in this way. That's why I
10:48:47 25 kept -- we kept going through this during the whole course

1 of the trial. This was designed in a specific way. And
2 that's why I asked Ms. Michelson several times what exactly
3 is your claim the trade dress is.

4 Now, I think we have an idea. It's the appearance.
10:49:01 5 Well, when it goes out into the marketplace, the appearance
6 includes the labels and the coloring. That's part of it.
7 You can't -- if that's what your trade dress is, just the
8 outward appearance of it. So you can't exclude the color
9 and the -- and the label if that's what your trade dress
10:49:20 10 claim is because it doesn't go out in the marketplace
11 without it. There's no evidence of it anyway.

12 MR. MILLER: Okay.

13 First of all, I don't intend to be silly at all, and I
14 certainly don't mean to come through that way. Second of
10:49:29 15 all, I believe that when I get in the courtroom, I heard Ms.
16 Michelson answer by saying that the trade dress is the
17 outward appearance of the silhouette and shape of the item.

18 THE COURT: Okay. Fair enough. I got it.

19 MR. MILLER: Thank you.

20 THE COURT: You want to argue the other ones
21 or no?

22 MS. MICHELSON: Okay.

23 Your Honor, on the unfair competition claims, there
24 indeed has been testimony and evidence from which --
10:50:16 25 actually on all of them -- a reasonable jury could conclude

1 and find in favor of Groeneveld.

2 On the Lanham Act, unfair competition claims, you
3 know, the issue -- the issue, the statute basically says any
4 word, term, make, symbol or device or combination thereof
10:50:38 5 that is likely to cause confusion, and the statute itself is
6 not limited to confusion of end user consumers, and
7 legislative history and the case law makes clear that it is
8 not limited to point of sale confusion on the part of end
9 user customers. And I believe that's what Defense counsel's
10:51:04 10 argument is on the likelihood of confusion. And that is not
11 the test at all.

12 It is not limited that way by the statute, by the
13 legislative history or by any other case law. And in this
14 case, there is substantial evidence of a likelihood of
10:51:19 15 confusion. There indeed is evidence of actual confusion.
16 There is evidence.

17 Dean Osborn, a guy who buys these things in Wisconsin,
18 basically said that when he sees the Groeneveld -- when he
19 saw the Lubecore, he thought -- he immediately thought oh,
10:51:39 20 it's a Groeneveld with a Lubecore label. He recognized the
21 shape like that on sight. He immediately associated the
22 Lubecore pump with the Groeneveld, notwithstanding the
23 label. He bought it because he thought oh, because the
24 outside of the thing looks the same, then the inside must
10:51:57 25 work just as well. Product -- quality confusion is as

1 actionable under the Lanham Act as the -- as any other kind
2 of confusion. The statute does not limit it in the way the
3 Defense counsel urges here, and there's ample authority that
4 supports it.

10:52:15 5 So there is evidence of actual confusion, and there's
6 more. There's -- there is -- the law says that people in
7 the industry, besides end user customers who are confused
8 upon seeing the two, who are uncertain upon seeing the two,
9 who find the two confusingly similar and, therefore, have to
10:52:42 10 go embark on some sort of investigation to figure out what
11 the heck is happening in the marketplace, that counts. That
12 is actual confusion. And not only is it actual confusion of
13 them, it's evidence of the likelihood of confusion that
14 others in the marketplace, including an end user of the
10:53:00 15 product, will also experience the same kind of confusion.

16 Intentional copying is one element and, your Honor, I
17 am not going to pretend that the label isn't one factor that
18 a jury can consider. The point is it's not the only factor,
19 and it is not dispositive of the issue here, especially when
10:53:21 20 witness after witness after witness, including defense
21 witnesses, that they see the Lubecore and think of a
22 Groeneveld, and that the label, especially in this industry,
23 means so little.

24 Bill Koppelman, Defense witness, said that the label
10:53:40 25 is the last thing that he and, therefore, people in his

1 place, in his industry, would look at to identify a pump.
2 And the fact that -- you know, we have pumps with all
3 different kinds of names on them and you cannot tell by
4 looking at that label where it was made, who made it, who
10:53:59 5 created it, where it came from, what the relationship is.

6 So the label doesn't do it. It's not the be all and the end
7 all.

8 We have evidence of actual confusion, and we have
9 compelling evidence of intentional copying, notwithstanding
10:54:18 10 their dispute of it. There is compelling evidence that that
11 thing would not look exactly like Groeneveld's thing unless
12 there was a concerted intentional effort to make it so.

13 THE COURT: I mean if it's nonfunctional,
14 that's okay, isn't it? Or if it's functional, it's okay?

10:54:40 15 MS. MICHELSON: Copying a functional --
16 copying the inside -- okay. I won't say it's okay. I will
17 say we don't have a claim for it. We're not claiming that
18 that is unlawful. Okay. I agree with you.

19 THE COURT: I mean you're making it sound like
20 if it's -- the jury finds that it's functional, then there's
21 a problem.

22 MS. MICHELSON: No.

23 Well, I don't mean to articulate it that way because
24 as I did say before --

10:55:05 25 THE COURT: Just let me only ask you one last

1 question.

2 MS. MICHELSON: -- different parts of evidence
3 applies to different pieces in different ways.

4 THE COURT: With you on that.

10:55:12 5 On the damages issue, what evidence -- is there any
6 evidence here that anybody bought the Lubecore pump in lieu
7 of a Groeneveld pump?

8 MS. MICHELSON: Well, I will -- I will say
9 one, it's not legally required for us to get damages in the
10 way they've structured our jury instructions and in our
11 briefing, but two, yes, Dean Osborn said he bought it
12 because he thought, looking at it, that it was the same
13 thing, except somebody else was selling it, that it was a
14 Groeneveld product with a Lubecore label being peddled by
15 Groeneveld people, made by Groeneveld people, same
16 technology, same source and origin.

17 THE COURT: Okay. Whoa. Take a breath.

18 That means if there is damages, you could be awarded
19 damages for that purchase. But, how about the other? How
20 do you then extrapolate out that anybody who want a Lubecore
21 pump, if they didn't buy the Lubecore pump, they would have
22 bought a Groeneveld pump?

23 MS. MICHELSON: I understand your question,
24 and I'm going to answer it in this way.

10:56:15 25 It is not the law that we must prove a connection

1 between each sale to a customer who is confused. The law
2 is -- does not require that we prove -- we prove
3 infringement or unfair competition, we prove liability, and
4 we are entitled to recover the actual damages, Groeneveld's
10:56:50 5 actual damages from sales of the infringing product or the
6 unfair product, however you want to describe it; the
7 competing product, disgorgement of Lubecore's profits,
8 and/or corrective costs. They -- the statute -- the law
9 doesn't require us to establish the link in the way that the
10:57:11 10 Defendant is urging here. And I do have some law, and I can
11 find it if you want --

12 THE COURT: You don't need to. You don't need
13 to.

14 MS. MICHELSON: I believe we did brief the
10:57:21 15 issue, and I am prepared to find it if you'd like those
16 citations.

17 THE COURT: You don't need to.

18 You want to respond, Tom, and then we're ready to go.
19 I'm ready to go.

10:57:32 20 MR. ANASTOS: I listened to all the testimony
21 read by Mr. Miller from Mr. Vermeulen's -- Mr. Hulst's
22 testimony, and Mr. Miller's summation was that this is the
23 evidence of nonfunctionality. None of that was any evidence
24 of nonfunctionality. It was that they wanted to make
10:58:08 25 something different. Different is not the definition of

1 nonfunctionality. That you could make other pumps that
2 would function the same way and look different is not the
3 issue of nonfunctional versus functional.

4 All of this is entirely irrelevant to the question of
10:58:25 5 whether or not the pump that they made is nonfunctional.

6 They have to prove that the pump that -- the look of that
7 pump is nonfunctional, not that you could do it other ways
8 at all. And different does not mean nonfunctional. Nice
9 looking does not mean nonfunctional. Nonfunctional means it
10:58:47 10 was arbitrary in the design. There's no engineering basis
11 for how it looks.

12 And actually, I want to bring you back to one last
13 point, your Honor.

14 Mr. Van der Hulst was testifying about which pump,
10:58:59 15 which one of these was the one that they tried to make look
16 nice. Mr. Van der Hulst was talking to a pump -- about a
17 pump that they designed in the early 80's. We know from
18 Mr. Eissis' testimony that the testimony that we're talking
19 about here didn't even come on the market until the 90's.

20 So Mr. Van der Hulst's testimony that they were trying
21 to make something look distinctive would mean the one you
22 look at right there on the end with the black cap on it is
23 the distinctive looking one that they put all this effort
24 into to look nice.

10:59:26 25 Now, if that one is nonfunctional, then almost by

1 definition in their scheme of things, the next one is
2 nonfunctional in its design, and the next one is
3 nonfunctional in its design. So that means every pump,
4 every automated -- every single stroke, EP-0 piston-driven
10:59:43 5 pump on the planet is nonfunctional according to Groeneveld
6 because they've captured all of these.

7 They -- according to them, they could see somebody
8 who's using -- whose pump looks like Mr. Eisis' based on
9 the first one they made there because it's a distinctive
10:59:59 10 design, which Mr. Van der Hulst said hasn't changed in any
11 major respect since the early 1980s. Well, look at them.
12 It's changed in significant respects since the early 1980s.

13 I listened to Mr. Osborn testify. I don't remember
14 Mr. Osborn testifying in any way, shape, or form that he
11:00:20 15 purchased the Lubecore pump because he thought it would be a
16 good pump based on its look. He was 100 percent aware of
17 who he was purchasing it from. He was 100 percent aware of
18 what product he was purchasing. He testified that he likes
19 both pumps. He likes the people he's dealing with, he might
11:00:38 20 consider to keep buying both of them. It was absolutely
21 zero testimony that he was confused or that he relied on the
22 look of the Groeneveld -- the Lubecore pump in making the
23 purchase, relied on it in terms of having dictated that it
24 must be a reliable piece of equipment because it looks like
11:00:56 25 a Groeneveld pump.

1 Of course, Mr. Koppelman can recognize the look of the
2 Groeneveld pump without having to look at the label. The
3 man has sold thousands of them. He was -- he's Fuel Systems
4 Industries. They were a Groeneveld distributor for how many
11:01:15 5 years? Why wouldn't he be able to? That's not the issue
6 here. It's whether the more common Joe, the more common
7 truck purchaser would look at that silhouette and say that's
8 a Groeneveld, and there's no testimony about that at all in
9 this case.

11:01:30 10 I disagree, and I can bring the law out in terms of
11 what they would need to prove in order to make a causal link
12 between any infringing activity and damages. They have
13 failed to do so whatsoever. It's not a general assumption
14 that if there's any form of infringement, that the party is
11:01:51 15 entitled to willy-nilly damages. They still have to prove
16 to a degree of certainty that there's a causal link between
17 the alleged -- or even if it's found infringing activity in
18 the lost sales.

19 THE COURT: Okay.

11:02:06 20 I've listened to everything, believe me. I looked at
21 everything. There's insufficient evidence to go forward
22 with Counts 2 through 6. The motion is granted. As to
23 Count 1, I'm going to reserve ruling and let you go ahead
24 and argue. So I'll give you a 15-minute break, get your
11:02:19 25 charge up here, and we're ready to go.

1 MR. ANASTOS: Thank you, your Honor.

2 THE COURT: And you have to get your exhibits
3 together. I don't think you have.

4 MR. ANASTOS: I think we're ready to --

11:02:27 5 MS. ZUJKOWSKI: I can tell her the rest of the
6 list now.

7 THE COURT: Do it and I have another thing to
8 do and let Shirle take a break.

9 (Thereupon, a recess was taken.)

11:16:05 10 MS. ZUJKOWSKI: Your Honor, the Defense moves
11 to include in the record Exhibits -- Defendant's Exhibit A,
12 DX-A, DX-B, DX-E, DX-K, DX-L, DX-X, DX-Y, DX-AA, DX-BB,
13 DX-CC, DX-DD, and DX-EE.

14 I did just communicate this list to Mr. Kunselman
15 before the break so I'm not aware yet whether or not there
16 are objections. I'll let them speak to them.

17 THE COURT: Okay.

18 MS. MICHELSON: I'm just looking at this --
19 what's DX-E?

11:16:58 20 MS. ZUJKOWSKI: E.

21 MR. KUNSELMAN: Exemplar.

22 MS. ZUJKOWSKI: With Greco -- we'll withdraw
23 that.

24 MS. MICHELSON: Okay. And I just have to look
11:17:19 25 and see which is A and I know is this the A? Just so --

1 that's A and that's B. Okay. No objection to A or B. K,
2 no objection. L, no objection. And what else you have, X?

3 MS. ZUJKOWSKI: Yes.

4 MS. MICHELSON: I object to X. I object to --
11:18:06 5 hold on one second. I have to think. I object to Y. I
6 object to Z, I object to AA. I have to see which one is BB.

7 MR. ANASTOS: The smaller Lubecore.

8 MS. MICHELSON: Oh. No objection to BB. I
9 object to CC, I object to DD, and to EE.

11:19:22 10 MS. ZUJKOWSKI: Your Honor, would you like me
11 to respond to the objections?

12 THE COURT: No.

13 I don't know what -- I don't have -- I don't think I
14 have it. I have X, the exhibit X, tell me what Y is.

11:19:44 15 MS. ZUJKOWSKI: Y is the one -- the first one
16 these earlier pumps.

17 THE COURT: All right. Z is what?

18 MS. ZUJKOWSKI: Z is the trademark
19 registration from Belgium Netherlands that Ms. Coker
20 indicated.

21 THE COURT: AA?

22 MS. ZUJKOWSKI: AA is this pump. So.

23 THE COURT: Got it. That's all right. I'm
24 with you. CC.

11:20:09 25 MR. ANASTOS: The family grouping pictures of

1 pumps.

2 THE COURT: DD?

3 MS. ZUJKOWSKI: The fact comparison sheet with
4 different -- between.

11:20:20 5 THE COURT: Let me see that. And this is
6 what?

7 MR. ANASTOS: Mr. Eissis testified to them.
8 The fact comparison sheets used in sales between Lubecore
9 and various other brands of pumps.

11:20:51 10 THE COURT: EE.

11 MS. ZUJKOWSKI: That's just the O-ring that
12 Mr. Eissis testified that they suit out in of the recall
13 warranty issue.

14 THE COURT: Okay. The objection to X, Y, Z,
11:21:05 15 AA, CC, DD, are overruled. All the other exhibits then will
16 be received.

17 You want me to give the instructions first or you want
18 to argue first?

19 MS. ZUJKOWSKI: I think we prefer the
11:21:14 20 instructions.

21 MS. MICHELSON: Yes, your Honor we do need to
22 also make our proffer for Mr. Rashidi's testimony that we
23 would have --

24 THE COURT: We can do that when we're on a
11:21:26 25 break.

1 MS. MICHELSON: Okay. Okay, Chris, I guess we
2 can get the jury.

3 THE CLERK: Okay.

4 MR. MILLER: Your Honor, so far I see two
11:21:44 5 things in the instructions.

6 THE COURT: That's all right. You can object
7 after I do it.

8 MR. KUNSELMAN:

9 MR. MILLER: No may I say one thing.

11:21:50 10 One of them will be a source of objection because I
11 don't think it will change your mind. One of them may be a
12 typo.

13 THE COURT: Yeah, I can --

14 MR. MILLER: Wan.

11:21:58 15 THE COURT: Do it quick.

16 MR. MILLER:

17 THE COURT: This is why I'm doing you a favor
18 you can argue the law.

19 MR. MILLER: Page 9, four lines up from the
11:22:10 20 bottom, supposed to be -- is it supposed to be singular
21 issue or multiple plural issue with an S on the end.

22 THE COURT: Oh, geez. As I read it, I --
23 sometimes I edit it a little bit.

24 MR. MILLER: Okay.

11:22:48 25 (Proceedings resumed in the presence of the jury:)

1 THE COURT: We are in session again. You may
2 have to sit back and relax a little bit because we're going
3 to go straight until we're finished if that's all right with
4 everybody rather than break for lunch have you come back and
5 go over it. But, each side has rested their case. That
6 means you've heard all the testimony that you're going to
7 hear during the course of the trial.

The next order of business will be the -- I'll give you some of the instructions every law so you can understand what the law that applies in the case. Then each side gets a chance to argue their case. The Plaintiff goes first because the Plaintiff has the burden of proof. The Defendant is then given an opportunity to argue its case, then the Plaintiff concludes or makes the final argument, and then I will give you some concluding instructions about your conduct in the jury room and other kind of procedural matters like that. What I'm going to do is ask you to -- yeah, to take all the instructions together, I may sit down as we do this I may keep standing, I don't know, but because this has to be recorded as well, that's why I moved over and done it like this.

22 But, let me say this as we go through the process.
23 Take each instruction together and make sure that you follow
24 the instructions I give you and I'll tell you that about ten
25 times during the course of these instructions. But, I will

1 tell you this, that I read the instructions out of an
2 abundance of caution to ensure or make sure that I don't
3 misstate the law to you. And they're all of equal
4 importance.

11:24:49 5 CHARGE OF THE COURT

6 THE COURT: Ladies and gentlemen of the jury,
7 we now come to the part of the trial where the Court gives
8 the jury the law in the case, and before I start or as I
9 start, I want to tell you something about the charge to the
11:24:58 10 jury.

11 As I told you several times, the jury, you are the
12 triers of the fact and the Court makes all the
13 determinations of law. So to help you understand this
14 charge and simplify it, I've divided it into basically three
11:25:13 15 parts. The first portion of the charge deals with the
16 general law that applies in almost every civil case. It
17 defines what evidence is, the burden of proof, credibility
18 of witnesses, and the function of the Court and the jury in
19 other matters like that.

11:25:33 20 The second area discusses the law that applies to the
21 specific claim or claims in this case. So I will review
22 with you the law that applies in this case and the various
23 elements of that law. I will also define for you terms that
24 require definition. Some of the terms are common and
11:25:51 25 generally understood and, therefore, do not require any

1 additional definition or explanation by me. I will then
2 instruct you on your duties in regard to your findings and
3 your verdict. After I tell you the law applicable in the
4 case, I will give you instructions about your deliberations.
11:26:10 5 This will include any questions or considerations I may
6 submit for your consideration and the verdict forms that I
7 give you for your final determination.

8 Now, you have heard the evidence in the case and you
9 are about to hear the arguments of the lawyers. It is now
11:26:26 10 the duty of the Court to instruct you on the law which
11 applies in this case. Remember again, that the Court and
12 the jury have separate functions. You decide the disputed
13 facts and the Court provides you the instructions of law.
14 It is your sworn duty to accept these instructions and to
11:26:42 15 apply the law as it is given to you by me. Therefore, you
16 are not permitted to change the law nor to apply your own
17 conception to what you think the law ought to be, given the
18 facts in this case. So in keeping with your oath, you will
19 not be swayed or influenced by considerations extraneous to
11:27:02 20 the law and the evidence, such as sympathy, bias, or
21 prejudice for or against any party to this lawsuit while it
22 is your duty to follow and apply to this case the law as the
23 Court now gives it to you. You and you alone are the judges
24 of the facts. And in this respect, you are to exercise your
11:27:20 25 own judgment without regard to anything which the Court may

1 have said or done during the course of the trial.

2 You know, during the course of this trial the Court
3 has been requested to rule upon objections made by
4 Plaintiffs and Defendant's counsel. These objections, as I
11:27:39 5 told you at the beginning, raise legal questions, and the
6 Court in deciding them has endeavored to follow the law. So
7 you will draw no inference of any kind from the manner in
8 which the Court has ruled upon any question of law, nor will
9 you because of any expression or other act of the Court
11:27:53 10 infer that the Court entertains any motion whatsoever as to
11 the facts in this case. The Court must not, and then,
12 therefore, does not, seek to invade the province of the jury
13 in determining the issues which you are called upon to
14 decide. And as far as you're concerned, the Court has no
11:28:10 15 opinion whatsoever on the matters which it is your
16 responsibility to decide. I'm going to give you an overview
17 statement of what I think the law is, but again, you have to
18 rely on what the evidence is.

19 The Plaintiff here, Groeneveld Transport Efficiency,
11:28:26 20 Inc., Groeneveld, asserts that the design features and
21 overall appearance of Defendant, Lubecore International,
22 Inc.'s, Lubecore's automated truck lubrication system is so
23 similar to the design features and overall appearance of
24 Groeneveld's EP-0 pump as to confuse buyers and harm
11:28:46 25 Groeneveld. As such, Groeneveld asserts that Lubecore

1 committed infringement of the trade dress of Groeneveld's
2 product in violation of the Lanham Act. That's 15, United
3 States Code, Section 1125(a).

4 This is not a patent case as neither Groeneveld's pump
11:29:04 5 itself nor any of its components parts are protected by a
6 patent. Thus, there is no prohibition against copying the
7 functional design of Groeneveld's pump; rather, Groeneveld
8 will only be entitled to relief if you find that Groeneveld
9 is entitled to trade dress protection under the Lanham Act.

11:29:23 10 In this case, Groeneveld asserts that the trade dress
11 of its EP-0 pump is the external shape and appearance of the
12 pump, which would include all aspects of its external
13 appearance, including its logo and color. I will describe
14 the elements of Plaintiff's trade dress claim later in these
11:29:42 15 instructions. The Defendant Lubecore denies the Plaintiff's
16 claim.

17 At the commencement of this trial, counsel for the
18 Plaintiff and counsel for the Defense each addressed you in
19 what we have referred to as opening statements. And in
11:29:56 20 those opening statements, they sought to outline for you
21 what they expected the evidence to show as the trial
22 progressed. Now, when we conclude here or when I conclude
23 with these instructions, there'll be a closing arguments,
24 and I'll have some comments about closing arguments right
11:30:11 25 immediately before they give them. But, remember this

1 again. Opening statements and closing arguments are proper
2 in an effort to assist the jury, but you are instructed that
3 they do not constitute evidence in this case. And,
4 therefore, will not be so considered by you, nor are you --
11:30:28 5 will you consider as evidence any testimony or any other
6 information which the Court has either withdrawn from your
7 consideration or has instructed you to disregard.

8 So whenever reference is made to evidence by which
9 this case is to be decided, the jury will understand that
11:30:44 10 the evidence includes all of the testimony that you heard
11 from the mouths of the several witnesses who appeared and
12 testified here during the trial, either by in person or by
13 written or oral deposition, any exhibits that have been
14 offered and received into evidence, and you'll have with you
11:31:00 15 when you retire in your deliberation and any stipulations,
16 which you heard the stipulations were read during the course
17 of this trial.

18 Now, evidence may be either direct or circumstantial
19 or both. Direct evidence is a recital of facts by witnesses
11:31:16 20 who have actual knowledge as to what transpired. It's the
21 testimony given by a witness who has actually seen or heard
22 the things concerning which that witness has testified.

23 Now, circumstantial evidence, on the other hand, is
24 the proof of facts or circumstances from which the jury may
11:31:32 25 infer other connected facts or related facts which naturally

1 and logically follow according to the common experience of
2 mankind.

3 And remember, you are permitted to make any logical
4 and immediate inference from the facts which you have found
11:31:46 5 to be established here in the evidence. Now, there's always
6 confusion, almost always confusion, by jurors or some jurors
7 as to the circumstantial evidence or the weight of it.

8 First of all, no type of evidence, either direct or
9 circumstantial, is any better or any worse than any other.
11:32:05 10 And it's up to you to decide what you believe and what you
11 don't believe. But, the best example I can think of, first
12 of all, direct evidence you know we talked about that in the
13 jury selection process. You actually see something or you
14 hear something, and you testify about that. That's pretty
11:32:17 15 simple. And the other thing is circumstantial evidence.

16 Now, an example of that would be this. You're all watching
17 me right now. And if you saw me and I took my index finger
18 and put it there, you all saw that, right? So you could
19 come here and testify at a later date that you saw me put my
11:32:34 20 right index finger on that piece of wood. That would be
21 direct evidence that I touched that piece of wood. Fair
22 enough? If the fact finder believed you, then that would be
23 sufficient to prove that I did that.

24 On the other hand, if there's nobody here, go back to
11:32:49 25 that example. And I did the exact same thing, put my finger

1 on that, then how would you -- how would a person prove that
2 I put my index finger on that piece of wood? Well, as you
3 probably know, there are such things as fingerprints, right?
4 And if you were told by an expert that there are no two
11:33:06 5 fingerprints alike in the world, and every individual -- my
6 right index finger are unique, that they could come in here,
7 and then they would dust this, and it's a dark piece of wood
8 use white powder -- you've seen that on TV -- and the
9 technician would dust it with a white powder and take a
11:33:23 10 piece of latex and tape and put it on -- on it, and it
11 lifts. That's called a latent fingerprint lift. And you
12 could look at it and you could see the ridges of my right
13 index finger, but it would take more testimony by the
14 technician to say okay, I run it, I counted the ridges,
11:33:39 15 whatever they do, to determine and identify an identifiable
16 print. They would compare it with all the known prints in
17 the world and come up with me. Then the technician could
18 come in here and say yeah -- yep, Don Nugent's right index
19 finger was found right here on that piece of wood.

11:33:58 20 Now, if you believed that technician, then that would
21 be sufficient for you to find that at some time, I put my
22 right index finger on that piece of wood. Sound fair? Now,
23 that's drawing an inference right from circumstantial
24 evidence. The latent print and the officer's testimony was
11:34:16 25 all direct evidence, but the inference you draw that I put

1 my right index finger comes from all the direct evidence
2 that you heard. Fair enough?

3 Now, when we say you can't draw one inference on
4 another inference, you can say I can draw the inference that
11:34:30 5 the Judge put his right index finger on that piece of wood,
6 but you couldn't draw the inference of when I did it, right?
7 Because nobody saw it. Nobody testified about it. So you
8 can't draw one inference from another. So that's what we
9 call circumstantial evidence.

11:34:43 10 Sometimes -- now this is more appropriate I think in a
11 criminal case, but sometimes circumstantial evidence is a
12 lot better than direct evidence because the fingerprint
13 doesn't lie and somebody may be mistaken. Don't worry. It
14 won't fall. Just the higher we are, the more they sway.
11:35:01 15 And if you start seeing me go like that, that's when you
16 have to worry.

17 (Laughter.)

18 THE COURT: So an inference is a reasonable
19 deduction of fact which logically follows from other facts
11:35:12 20 established by the evidence which you may but are not
21 required to make. And here's what we talk about. However,
22 you may not build one inference upon another inference, but
23 you may make more than one inference from the same set of
24 facts or circumstances. Those are issues or decisions for
11:35:27 25 you to make.

1 So having considered all the evidence, you must then
2 determine whether the parties have met their respective
3 obligations to prove their claims. Generally, the party
4 asserting a proposition to be true has the burden of proof
11:35:42 5 as to that proposition. The burden of proof means the duty
6 of producing evidence to lead you to believe that the facts
7 are as that claimant contends. So when a particular party
8 has the burden of proof on a particular issue, that party
9 must prove facts material to that issue by a preponderance
11:36:02 10 of the evidence.

11 The burden of proof then rests upon the Plaintiff in
12 this case to prove by a preponderance of the evidence the
13 essential and material allegations of their complaint which
14 are denied by the Defendant.

11:36:17 15 These affirmative allegations denied by the Defendant
16 constitute the issues of fact which the Plaintiff has the
17 burden to prove by a preponderance of the evidence. The
18 Defendant bears the burden of proving any affirmative
19 offense, but I don't think there are any in this case.

11:36:34 20 Preponderance of the evidence, what is that?
21 Preponderance of the evidence is the greater weight of the
22 evidence; that is, evidence that you believe because it
23 outweighs or overbalances in your minds the evidence that's
24 opposed to it. A preponderance means evidence that is more
11:36:49 25 probable, more persuasive, or of a greater probative value.

1 Remember it is the quality of the evidence that must be
2 weighed. Quality is not necessarily identical to quantity
3 or the greater number of witnesses produced. In determining
4 whether an issue has been proved by evidence, you should
11:37:12 5 consider all the evidence regardless of who produced it.

6 Now, if the weight of the evidence is equally balanced
7 or if you are unable to determine which side of an issue has
8 the preponderance, the party who has the burden of proof
9 then has not established that issue by a preponderance of
11:37:27 10 the evidence.

11 I know evidence in lawsuits is not always clear and
12 unquestionable. I do not expect you to decide the issues on
13 certainties. Injustice could easily result if you awarded
14 the verdict to a party who is only possibly entitled to it.

11:37:45 15 You cannot be satisfied with mere possibilities. Your
16 answers to the issues must be based on probability; what is
17 probably the truth, what is more likely the truth than not.
18 And another way of expressing this or your function is that
19 you are to decide the issues according to the preponderance
11:38:02 20 of all the evidence, regardless of who produced it.

21 So if you find the Plaintiff has proved its claim by a
22 preponderance of the evidence, in that event, your verdict
23 would be for the Plaintiff. On the other hand, if you find
24 the Plaintiff has failed to prove any one or more of the
11:38:17 25 elements of the Plaintiff's claim by a preponderance of the

1 evidence, your verdict would then be for the Defendant.

2 Now, as the sole judges of the facts, you are also the
3 sole judges of the credibility of the witnesses and the
4 weight to be given to every person's testimony. Now, to
11:38:34 5 weigh the evidence, you must consider the credibility or the
6 believability of each person who testified. To do this, you
7 apply the test of truthfulness that you all apply in your
8 own daily lives. And in determining the credibility of any
9 witness, you should consider the interest or bias the
11:38:51 10 witness may have in the outcome of the verdict, if any, the
11 witness' appearance, manner and demeanor while testifying
12 here before you, the witness' candor and frankness or lack
13 of candor or frankness, the consistency of that witness'
14 testimony with all the other known facts in the case, the
11:39:10 15 witness' accuracy of memory, the witness' intelligence or
16 lack of it, the reasonableness or unreasonableness of the
17 witness' testimony, in light of all the other facts and
18 circumstances presented in the case, and the probability
19 that the witness knows the truth of the facts and
11:39:27 20 circumstances established by the evidence, which, in your
21 judgment, would either add or detract from that witness'
22 credibility, and weigh their testimony, and which will
23 enable you to determine what degree of credibility you
24 assign to the testimony of any witness.

11:39:44 25 Now, you are instructed that one way of impeaching a

1 witness is by showing that the witness has made different
2 and contradictory statements on the same point on a former
3 occasion. If you find from the evidence that any witness
4 has been impeached in this manner, you may take that into
11:40:00 5 consideration in determining that person's credibility and
6 the weight you give to that person's testimony.

7 You are instructed that you are not bound to believe
8 something to be a fact simply because a witness has stated
9 it to be a fact. If you believe from all the evidence that
11:40:14 10 such witness is either mistaken or has testified falsely
11 concerning any such alleged fact, you may believe or
12 disbelieve any witness as you see fit. You are not then
13 required to believe what a witness has testified to, merely
14 because the witness -- or the statement was made on the
11:40:30 15 witness stand and/or under oath. You may believe all or
16 part or none of what any witness has said in accordance with
17 the credit to which you feel it is entitled in the exercise
18 of your honest and impartial judgment. As a matter of law,
19 then you may believe a portion of the testimony of any
11:40:48 20 witness and disregard the rest of that person's testimony or
21 you may disbelieve all the testimony of a particular witness
22 or you may believe all the testimony of a particular
23 witness. Those are evaluations and judgments for the jury to
24 make.

11:41:00 25 Now, I told you this before, too, but some testimony

1 here was presented by video. This evidence is to be
2 considered according to the same tests that apply to all
3 other witnesses. Now, if statements in a deposition differ
4 from the testimony given by the same witness in the
11:41:15 5 courtroom, you may consider them to test the believability
6 of such witness. And again, along this line, sometimes when
7 I talk about impeachment and about giving a different
8 statement on former occasion on the same issue, stuff like
9 that, you can use those impeachment techniques to determine
11:41:31 10 whether you believe a person's testimony or not, but whether
11 you do that, do you it like you do in your own life, make a
12 decision whether the mistake or the difference was about
13 some important fact or some unimportant detail or was the
14 result of intentional -- intentionally trying to mislead you
11:41:48 15 or not. It is a mistake or accident. Those things are
16 possible when things like that happen. You understand the
17 context of what goes on in the trial of a lawsuit.

18 The Rules of Evidence ordinarily do not permit
19 witnesses to testify about their opinions or conclusions.
20 An exception to this rule exists for expert witnesses. An
21 expert witness is a person who, by their education and
22 experience, has become an expert in some art, science,
23 profession, or calling. Expert witnesses may state their
24 opinions as to matters in which they profess to be an expert
11:42:22 25 and may also state their reasons for their opinions. You

1 should consider each expert opinion received in this case in
2 evidence and give it such weight as you think it deserves.
3 If you should decide that the opinion of an expert witness
4 is not based upon sufficient education and experience or if
11:42:40 5 you should conclude that the reasons given in support of the
6 opinion are not sound, or if you feel that it is outweighed
7 by other evidence, you may disregard the opinion of an
8 expert entirely. Just because a person is a witness does
9 not entitle them to be given more or less weight than any
11:42:55 10 other witness who appears before you. You judge their
11 testimony of any witness.

12 You must also not draw any inference for or against
13 any party from questions which the Court did not permit to
14 be answered. The Court alone as I've told you rules upon
11:43:12 15 the admission of evidence. Since you do not know the answer
16 to such questions, to guess what the answers might have been
17 would be improper. And you are not permitted to consider
18 for any purpose questions which the Court did not allow to
19 be answered, nor to consider any suggestions in questions of
11:43:27 20 counsel by reasons of such repetition. You may consider
21 only such evidence as the Court has admitted and give it
22 such weight and credibility as you think is appropriate.

23 Now, there were some demonstrative evidence. You'll
24 have some to go back with you. I'm not sure some of the
11:43:44 25 things on the writing board go back or not. I don't think

1 they do. They're used for demonstrative purposes. So don't
2 worry bring that. So certain models, diagrams, devices and
3 animations may have been shown to you. Those are used for
4 convenience to help explain the facts in the case and not
11:43:59 5 themselves proof of any fact. Certain charts and summaries
6 may have been received into evidence to illustrate
7 information brought out in the trial. Charts and summaries
8 are only as good as the underlying evidence that supports
9 them. You should, therefore, give them only such weight as
11:44:13 10 you think the underlying evidence deserves. Again, this is
11 all logical and make, I think, perfect common sense.

12 Now exhibits. There have been several or a number of
13 exhibits offered and received into evidence during the
14 course of the trial. Both by the Plaintiff and the
11:44:27 15 Defendant.

16 Now, when you go back in the jury room and you're
17 reviewing these exhibits, they may or may not follow
18 consecutively. There are a couple reasons for this. One,
19 the party that marked the exhibit may not have offered it
11:44:39 20 into evidence; two, for some legal reason or procedural
21 ruling, the Court may have decided not to admit that piece
22 of evidence into evidence. And so you don't have it with
23 you. So just take it -- trust me, you have -- you will have
24 all the evidence that was properly offered and properly
11:44:59 25 received into evidence during the course of the trial. And

1 you won't be given any others during the course of your
2 deliberations.

3 One other comment on that and sometimes jurors ask
4 this question and say well, will the Court Reporter be able,
11:45:13 5 permitted to read back any portion of any of the testimony
6 if we need it? The general answer is no. And the reason
7 for that is it used to be in the old days, it was too hard
8 to find that testimony through all the many bits of evidence
9 that we have during the course of the trial.

11:45:31 10 It's a little easier now with the modern technology
11 that we have, but it's -- generally the answer is no,
12 because to -- if you wanted to know the answer like to three
13 questions put to one witness, that may unduly highlight that
14 portion of the testimony and may be others in context.

11:45:48 15 That being said, if you come to a point where you say
16 look, we simply can't make a decision unless we hear certain
17 testimony or something, if we come to that and you can't
18 reach a verdict without doing it, then you just address a
19 question to me, and I'll answer the question. And there is
11:46:05 20 a good likelihood you might be able to hear maybe all the
21 testimony, not just that one part of it. Okay?

22 Now, I am now going to instruct you on the law as to
23 the specific claims in this case. When I say in these
24 instructions a party had the burden of proof in the
11:46:24 25 proposition or use the expression if you find or decide, I

1 mean you must be persuaded considering all the evidence that
2 the proposition is more probably true than not.

3 Now, the claims at issue. Trade dress violations
4 under the Lanham Act, 15, United States Code, Section
11:46:42 5 1125(a). Plaintiff claims that Defendant has infringed
6 Plaintiff's trade dress. Trade dress refers to the
7 nonfunctional physical detail and design of a product or its
8 packaging, which identifies the product source and
9 distinguishes it from the products of others. In this case,
11:47:06 10 Plaintiff states that its trade dress is the external
11 appearance and shape of its EP-0 pump, which would include
12 its logo and color. To recover on a claim of trade dress
13 infringement, Plaintiff must demonstrate by a preponderance
14 of the evidence:

11:47:23 15 1. That his trade dress, the external appearance,
16 shape, logo and color is primarily nonfunctional; and 2.
17 That the trade dress, the external appearance, shape, logo,
18 and color in question is distinctive in the marketplace and
19 has acquired secondary meaning; thereby, indicating the
20 source of the goods; and 3. That the trade dress of the
21 competing good is confusingly similar.

22 I will define each of these elements in turn.
23 Nonfunctional. In order to be protected, a Plaintiff's
24 trade dress must be nonfunctional. Functional elements
11:48:07 25 cannot be protected as trade dress. Indeed, where a

1 product, design, or feature is functional, and not otherwise
2 protected by patent, it is expected and even deemed
3 beneficial that they be copied. A product feature is
4 functional and so ineligible for protection if it is
11:48:31 5 essential to the use or purpose of the item or if it affects
6 its costs or quality.

7 Trade dress is considered functional if it performs
8 some function other than identifying the products that the
9 party produces. The test for determining trade dress
11:48:52 10 functionality provides that if the particular feature is an
11 important ingredient in the commercial success of the
12 product, the interest in free competition permits its
13 imitation in the absence of a patent or copyright. On the
14 other hand, where the feature, or more aptly, design, is a
11:49:15 15 mere arbitrary embellishment to the product, a form of dress
16 for the goods primarily adopted for purposes of
17 identification and individual alternate and hence unrelated
18 to basic consumer demands in connection with the product,
19 imitation may be forbidden where the requisite showing of
11:49:33 20 secondary meaning is made. Under such circumstances, since
21 effective competition may be undertaken without imitation,
22 the law grants protection. Trade dress may also be
23 considered functional if it puts a competitor at a
24 significant nonreputation related disadvantage. The
11:49:52 25 Defendant here contends that Plaintiff's EP-0 pump is

1 comprised of component parts, all of which serve a purpose
2 and all of which are located where they are for an
3 engineering reason. The Defendant contends this is
4 sufficient to render the component parts and the overall
11:50:10 5 shape of the pump functional, such that they cannot be
6 considered protectable trade dress. Plaintiff contends that
7 the external shape and appearance was assembled as they are
8 to look nice and to identify the source of the EP-0 pump as
9 Groeneveld. In order to receive trade dress protection for
11:50:28 10 the overall combination of functional or seemingly
11 functional features, those features must be configured in an
12 arbitrary, fanciful, or distinctive way. Conversely,
13 engineering necessity, influence is the configuration of the
14 functional components. The design is functional.

11:50:48 15 The availability of alternate designs does not render
16 a design nonfunctional. If you agree with the Defendant
17 that there is nothing arbitrary, fanciful, or distinctive
18 about Groeneveld's pump other than the Groeneveld logo and
19 green coloring, and that every component of the pump
20 performs a function and is part of the pump for a reason,
21 you must find for the Defendant, and it will not be
22 necessary to consider the other elements of this claim.
23 However, if you find that Plaintiff's trade dress, the
24 external appearance, shape, logo and color, is
11:51:23 25 nonfunctional, that is arbitrary, fanciful, or distinctive,

1 you should continue to the next element needed to establish
2 a trade dress claim. Only nongeneric configurations that
3 have acquired distinctiveness through the attachment of
4 secondary meaning satisfy the distinctiveness requirement of
11:51:42 5 the Lanham Act.

6 Secondary meaning occurs when in the minds of
7 prospective purchasers, the primary significance of the
8 trade dress, the external appearance, shape, logo, and
9 colors is to identify the source of the product, rather than
11:51:57 10 the product itself.

11 You should consider the evidence relating to the
12 following factors to determine whether the trade dress, the
13 external appearance, shape, logo, and color of Plaintiff's
14 EP-0 pump has acquired secondary meaning.

- 11:52:13 15 1. Direct consumer testimony.
16 2. Consumer surveys.
17 3. Exclusivity, length and manner of use.
18 4. Amount and manner of advertising.
19 5. Amount of sales and number of customers.
20 6. Established place in the market.
21 7. And proof of intentional copying.

22 Groeneveld need not put on evidence of all of these
23 factors and no single factor is determinative. So if you
24 find that the trade dress, the external appearance, shape,
11:52:49 25 logo, and color of Plaintiff's EP-0 pump has not acquired

1 secondary meaning, you should then consider whether a
2 secondary meaning should be inferred as described in the
3 next instruction.

4 If you find that Plaintiff's trade dress has acquired
11:53:04 5 secondary meaning, then you must go on to consider whether
6 the final element of Plaintiff's trade dress claim has been
7 established.

8 You may consider whether Plaintiff has established a
9 rebuttable presumption of secondary meaning only if you find
11:53:18 10 that Groeneveld's trade dress, the external appearance,
11 shape, logo, and color is nonfunctional as I have previously
12 instructed. When it is established that a market newcomer
13 has intentionally copied an existing product's trade dress,
14 a presumption arises that the intent in such intentional
11:53:39 15 copying was to benefit from the good will of the
16 competitor's customers by getting them to believe that the
17 new product is either the same or originates from the same
18 source as the product whose trade dress was copied.

19 In essence, if the evidence shows that Lubecore
11:53:55 20 intentionally copied Plaintiff's trade dress, the external
21 appearance, shape, logo, and color, it may then be presumed
22 that Plaintiff's trade dress, the external appearance,
23 shape, logo, and color is distinctive. However, even a
24 finding of intentional copying does no more than raise a
11:54:13 25 rebuttable presumption of secondary meaning.

1 Lubecore may rebut the presumption with evidence of
2 some logical reason for copying other than to capitalize on
3 pre-existing reputation. Where there is no evidence that
4 copying was done with an intent to deceive purchasers, and
11:54:30 5 thus, derive a benefit from another's name and reputation,
6 but rather was done to avail the copying party of a design
7 which is attractive and desirable, there is no presumption
8 of secondary meaning. Indeed, where elements are
9 nonfunctional and not otherwise protected by patents, it is
11:54:47 10 expected and even deemed beneficial that they be copied.

11 So if you find that Groeneveld has proven by a
12 preponderance of the evidence that Lubecore intentionally
13 copied Groeneveld's trade dress, the external appearance,
14 shape, logo, and color, and you find that Lubecore has not
11:55:04 15 rebutted the presumption with evidence that its copying was
16 for a reason other than to deceive purchasers, and thus
17 derive a benefit from another's name and reputation, then
18 you may draw an inference that Groeneveld's trade dress, the
19 external appearance shape, logo and color, has secondary
20 meaning, and thus, is distinctive.

21 So if you find that Groeneveld has not proven by a
22 preponderance of the evidence that Lubecore intentionally
23 copied Groeneveld's trade dress or if you find that Lubecore
24 has provided sufficient rebuttal evidence that its copying
11:55:39 25 was not to deceive purchasers, and thus, derive a benefit

1 from another's name and reputation, then you will not draw
2 an inference of secondary meaning based on Lubecore's
3 intentional copying.

4 Now confusingly similar, even if Plaintiff's trade
11:55:55 5 dress, the external appearance, shape, logo, and color is
6 determined to be both nonfunctional and distinctive, it is
7 acquiring secondary meaning. In order to prevail on a trade
8 dress infringement claim, Plaintiff must establish the
9 existence of a likelihood of confusion in the minds of
11:56:13 10 consumers as to the source or origin of the two parties'
11 products. Essentially, what the law forbids is one party
12 passing off its goods as those of another.

13 In determining whether a likelihood of confusion
14 exists, the following factors should be considered:

11:56:31 15 1. Strength of Plaintiff's trade dress -- again,
16 external appearance, shape, logo and, color.

17 2. Relatedness of the goods.

18 3. Similarity of the trade dress, the external
19 appearance, shape, logo, and color.

20 4. Evidence of actual confusion.

21 5. Commonality or similarity of marketing channels
22 used.

23 6. Likely degree of purchaser care.

24 7. Defendant's intent in selecting the trade dress --
11:57:03 25 the external appearance, shape, logo, and color.

1 And 8. Likely expansion of the product line.

2 Now, again, no single factor is dispositive. Rather,
3 the factor serve as a guide to determine whether there is a
4 likelihood of confusion. So if you find that there is not a
11:57:20 5 likelihood that a reasonable consumer of automated truck
6 lubrication system products would be confused as to the
7 source of Defendant's EP-0 pump, then you must find for the
8 Defendant.

9 If you find that there is a likelihood of confusion,

11:57:34 10 and that Plaintiff's trade dress, the external appearance,
11 shape, logo, and color has acquired secondary meaning, and
12 is nonfunctional, then you should enter a verdict in favor
13 of the Plaintiff on its trade dress infringement claim.

14 Now, I'm now going to -- that covers the instructions of the
11:57:51 15 legal principles on the claim in the case.

16 I'm now going to instruct you on the issue of damages
17 that may be awarded if you find that Groeneveld has proved
18 its claims by preponderance of the evidence.

19 Now, remember this, too. The fact that I will give
11:58:04 20 you instructions on the issue of damages does not mean that
21 I think you should or you should not rule in favor of a
22 particular party, nor does it mean that you should or should
23 not award damages. The instructions are given so that if
24 you do award damages, you will have guidance in how to make
11:58:20 25 such an award.

1 If you find that Lubecore committed the acts of trade
2 dress infringement, in violation of federal law, then you
3 must determine Groeneveld's damages as a result of
4 Lubecore's conduct as proved by a preponderance of the
11:58:36 5 evidence.

6 Compensatory damages consists of the amount of money
7 required to compensate Groeneveld for the injury caused by
8 Lubecore. In determining compensatory damages, the
9 difficulty or uncertainty in ascertaining the precise amount
11:58:52 10 of damages does not preclude recovery. Instead, you should
11 use your best judgment in determining any amount of such
12 damages. You may not, however, determine damages by
13 speculation or conjecture. You must determine the amount of
14 money that will reasonably and fairly compensate Groeneveld
11:59:10 15 for any injury you find was caused by Lubecore's conduct.
16 Groeneveld must prove its compensatory damages by a
17 preponderance of all the evidence. You should consider
18 whether any of the following exists; and if so, to what
19 extent in determining Groeneveld's damages.

20 1. Any injury to Groeneveld's reputation; any injury
21 to Groeneveld's good will, including any injury to
22 Groeneveld's general business representation; any loss of
23 Groeneveld's sales as a result of Lubecore's conduct; and
24 any loss of Groeneveld's profits, any expense of preventing
11:59:43 25 customers from being deceived, any cost of future corrective

1 advertising reasonably required to correct any public
2 confusion caused by Lubecore's conduct; and seven, any other
3 factors that bear upon Groeneveld's actual damages.

4 The reputation and good will of a company is an
12:00:01 5 intangible business value that reflects the basic human
6 tendency to do business with a company that offers products
7 of the type and quality the consumer desires and expects.
8 The reputation and good will associated with a particular
9 product or business may be symbolized by consumers'
12:00:19 10 acceptance and recognition of trade dress. The good will
11 attached to a product is often part of overall company -- or
12 company's overall good will. It is possible, therefore,
13 that the general good will of a company may be damaged by
14 the loss of good will for a particular product. Whether
12:00:36 15 this has occurred in this case is a question of fact that
16 you have to answer.

17 If you find that Groeneveld's good will has been
18 damaged either by injury to his general business reputation,
19 or by injury to the good will of his product, you may award
12:00:48 20 whatever compensatory damages you find justified by the
21 evidence presented. The measure of Groeneveld's loss of
22 good will is the difference between the value of such good
23 will before and after Lubecore's infringing activities.

24 Now, I'm almost finished. Better for me than you. In
12:01:14 25 addition to compensatory damages, if you find that Lubecore

1 committed acts of trade dress infringement under federal
2 law, then Groeneveld is also entitled to any profits earned
3 by Lubecore that are attributable to Lubecore's infringing
4 conduct. However, you may not include any award or profit
12:01:30 5 any amount that you included in determining compensatory
6 damages. Profits are determined by deducting all expenses
7 and production costs from the gross revenue associated with
8 the infringing conduct.

9 Gross revenue is all of Lubecore's receipts from using
12:01:45 10 the infringing trade dress in the sale of its product.

11 Expenses are all costs incurred in producing the gross
12 revenue. Groeneveld has the burden of proving by a
13 preponderance of the evidence the gross revenues and
14 Lubecore has the burden of proving by a preponderance of the
12:02:00 15 evidence the expenses and costs.

16 If the actual sales by Lubecore cannot be precisely
17 determined, you may resolve any doubts against Lubecore in
18 calculating profits, particularly, if you find that the
19 uncertainty is due to Lubecore's inadequate record keeping
12:02:16 20 or failure to produce documentary evidence to Groeneveld.

21 So now the other thing is if you're -- if you are
22 considering an award of damages, you cannot consider
23 attorney fees, court costs, or what we call punitive damages
24 because they're not applicable. You put that aside. The
12:02:37 25 only damages you can consider are those I've enumerated here

1 in the instructions.

2 Now, the lawyers have a chance to argue their case to
3 you. In contrast to opening statements, you heard testimony
4 and you've seen the evidence. When a lawyer gets up before
12:02:51 5 you to go over what they think the evidence has shown,
6 they've heard that, too. As I told you at the beginning,
7 they've also had a chance to talk to these witnesses on
8 other occasions and read documents and transcripts and other
9 things. So if a lawyer says something that you don't
12:03:07 10 remember from the evidence or that you remember differently,
11 believe me, I don't think any of these lawyers will ever try
12 to intentionally mislead you. They may be confused or your
13 memory may be short on that issue.

14 At the end of the day, though, you have to decide what
12:03:22 15 you recall the evidence to be, not what a lawyer says or
16 anybody else tells you. It's your recollection that
17 controls. Same thing with a lawyer. They're really not
18 permitted to comment on the things that it is your duty to
19 decide. That means the credibility of any witness and
12:03:39 20 whether -- what verdict that you should return. And if a
21 lawyer makes a comment, improper kind of in the heat of the
22 battle, disregard that because ultimately you have to decide
23 what evidence you believe, if any, whether the Plaintiff
24 proved its claim by a preponderance of the evidence; and if
12:03:57 25 they did, what amount of damages should be awarded.

1 So sit back, relax, accept the arguments of the
2 lawyers in the spirit with which it's intended, and when we
3 come back, when I come back, I'll give you a little bit
4 about your conduct in your deliberations and in the jury
12:04:14 5 room. And again, since the Plaintiff has the burden of
6 proof, they go first, then the Defense has a chance to argue
7 and then the law requires the Plaintiff to conclude or make
8 the final argument.

9 MS. MICHELSON: Your Honor, can we be heard on
12:04:25 10 the jury instructions?

11 THE COURT: No. Go ahead.

12 CLOSING ARGUMENTS ON BEHALF OF THE PLAINTIFF

13 MS. MICHELSON: Thank you, your Honor.
14 Counsel, and ladies and gentlemen of the jury. Thank you,
12:05:31 15 first of all, so much for paying attention and listening
16 through our case. It's so important that we have people
17 who are willing to perform this function in our system. And
18 I know that you have paid attention and we appreciate that.

19 Ladies and gentlemen, you have heard all the testimony
20 that you've received and the evidence that you've received,
21 and I told you at the beginning of the case in opening
22 statements that we would show that Lubecore intentionally
23 copied the Groeneveld EP-0 ALS automatic lubrication system
24 and the system, but the case is about the pump in order to
12:06:29 25 piggy back on the good will of what Lubecore and its

1 founder, Mr. Jan Eissis, knows is a 30-plus year established
2 reputation in the United States and overseas of a company
3 that invested significant resources, significant time,
4 significant effort into creating its own unique and
12:06:57 5 distinctive product and selling it to the public of people
6 who use it.

7 They intentionally copied it. He intentionally copied
8 it and that is an intentional copy of the Groeneveld pump,
9 in order to -- in order to take advantage of that
12:07:25 10 reputation, take advantage of industry personnel, immediate
11 recognition and association of what the Groeneveld thing
12 looks like with the tried, true, and tested marketplace
13 player.

14 Defendant, Mr. Eissis, testified that he wanted to
12:07:53 15 forge his own identity, his own corporate image, and his own
16 unique place in the market. He says he wants to do so and
17 made effort, an effort was made, to make his thing look
18 different than Groeneveld's thing. So that his pump that he
19 says is better would not be associated with Groeneveld.

20 Ladies and gentlemen, you have your own eyes and you
21 have your own ears, and you have your common sense. His
22 thing, triggers in the minds of people who work in this
23 world and live in this world, an immediate association with
24 Groeneveld. They all say I look at the Lubecore and I think
12:08:46 25 it's a Groeneveld, with a Lubecore label. They think it's a

1 Groeneveld with a Lubecore label. The shape, the
2 silhouette, the outline, the way the thing looks, the way
3 it's presented, triggers in their mind this association. A
4 person who is looking to forge his own and establish his own
12:09:12 5 corporate individual identity in the marketplace is not
6 going to appropriate virtually every single thing that looks
7 identical to someone whose product, he says, he's trying to
8 disassociate himself from.

9 There is -- it is not possible that the Lubecore pump
12:09:41 10 is anything other than an intentional imitation. Not only
11 does it look the same, the dimension -- the nominal
12 dimensions of the component parts inside and out, the
13 nominal dimensions are the same. The pieces are the same.
14 Nobody -- I mean use your common -- this is just common
12:10:06 15 sense. Nobody starts with a piston that looks like the
16 piston on this easel that Mr. Eisis drew and we had one
17 when he testified, nobody starts with that and working
18 backwards comes up with 50-plus component parts as part of a
19 pump that measure the same and put them together in
20 practically the same exact way without it being a purposeful
21 thing. To pretend otherwise is disingenuous. It's not
22 credible. And to pretend otherwise leads to the conclusion
23 that the intention was not -- the intention was to piggy
24 back the reputation of the established market player by the
12:11:11 25 newcomer on the market.

1 The witnesses all testified that the Groeneveld is
2 recognizable. The Groeneveld pump is recognizable to them
3 on sight, they know it when they see it, and when they saw
4 the Lubecore, they thought it was a Groeneveld with a
12:11:35 5 Lubecore label. The label is not the thing that makes it
6 visually dissimilar from the Groeneveld. The thing that
7 pops out at you, especially when you look at all the other
8 competing pumps, all of them, none of them look exactly like
9 the Groeneveld, none of them except the Lubecore. The thing
12:12:06 10 that pops out at you when you look at them and now that
11 you've had some experience looking at a few of them, you see
12 that the thing that pops out at you is its shape, its
13 silhouette, because that's when people are in the
14 marketplace and looking at these products, that's the thing
12:12:31 15 that makes it distinctive and unique. That's the -- that's
16 the trade dress. And that's what Groeneveld is seeking to
17 protect, the trade dress that it has used since the pump was
18 designed 25, 30 years, 30 plus years, and in the market,
19 here and overseas during that time period.

12:12:52 20 And I did -- I know they brought in last minute ambush
21 thing with these other two pumps that were --

22 MR. ANASTOS: Objection.

23 MS. MICHELSON: Predecessors.

24 THE COURT: Objection sustained.

12:13:02 25 MS. MICHELSON: To the pump at issue in this

1 case, but if you -- if you look at the three generations,
2 the overall visual impression that the three create is the
3 same, the overall shape is the same. It's been consistent
4 through the history. The test is not whether you
12:13:54 5 side-by-side can find differences in pumps and products,
6 whether if you take a look at something and study it you can
7 find. So there's an angle here instead of here. It's a --
8 the test is not the side-by-side comparison.

9 I don't know if any of you read People Magazine.
12:14:18 10 Sometimes I do when I'm coming back from trips on an
11 airplane, some kind of mind candy treat I give to myself.
12 You turn to the back, and they have these pictures of find
13 the differences. The two pictures are exactly alike and
14 you're there studying them to find the differences. When
12:14:33 15 you study them, you can find differences, but the overall
16 impression that is created is that they are the same.

17 The overall impression that the Lubecore pump gives is
18 the same impression of this Groeneveld pump. The shapes are
19 identical. I mean you could layer them over on top of each
20 other and they would match. In fact, Mr. Willem van der
21 Hulst testified about how Groeneveld broke down the Lubecore
22 and measured the parts and fed the data into a computerized
23 program and showed how they layer on to each other.

24 It is an intentional copy. To pretend otherwise is
12:15:32 25 not credible and the reasonable logical inference from

1 pretending otherwise is that the intent was not innocent but
2 rather was to piggy back on somebody else's reputation and
3 position in the marketplace.

4 The confusion and the uncertainty in the marketplace
12:16:04 5 that's created, that is actionable here, that we contend
6 that Groeneveld is actionable here is that when people look
7 at it, they will think it's the same inside; same quality,
8 works the same, same recipe, same formula, same drawings, it
9 emanates from the same source, same origin, maybe the same
12:16:30 10 factory, maybe the same tooling. The confusion is,
11 according to Mr. Eissis and Vermeulen, their witnesses, it's
12 not true because there are differences -- and Mr. Van der
13 Hulst -- there are differences in tolerances, differences in
14 materials, there are differences in the way the parts
12:16:59 15 interact with each other internally. But, when you see it,
16 you don't know that.

17 Mr. Vermeulen said, he said you can't tell it by
18 looking at it. That's the confusion. That's the
19 uncertainty. That's the -- as it is the Defendant's
12:17:35 20 position that the internal components, notwithstanding what
21 the 3-D drawings and the break down in internal components,
22 that they are -- that they are measuring the same and almost
23 all the same with some slight variation, notwithstanding
24 that testimony, it's the -- which are meaningful variation
12:18:02 25 by the way, according to everybody, meaningful in that they

1 do affect the quality and performance of the system,
2 notwithstanding that, Defendant says it's different on the
3 inside. Ours is different, different, different. It's
4 different. But, people in the industry don't know that by
12:18:17 5 looking at it. They can't tell that by looking at it. And
6 they look at it and think it's got to work as well as the
7 Groeneveld because I know the Groeneveld for 30 years or 10
8 years or 20 years, whatever their particular experience is,
9 and it's the same.

12:18:39 10 Dean Osborn, he testified by video. He was the guy in
11 Wisconsin whose, I guess, great-great-granddad started the
12 company, he testified that he -- when he saw it, when it was
13 pitched to him, he was comfortable with the product, with
14 the Lubecore. Why? Because it imitated, it looked exactly
12:19:03 15 like the Groeneveld to him and he actually said it's a
16 Groeneveld with a Lubecore pump. He didn't care about the
17 label. He cared that he recognized the product as a quality
18 product because it -- he associates it with the Groeneveld.
19 He was comfortable with it for that reason. He bought it
12:19:27 20 because of that comfort. He had options to buy something
21 besides Groeneveld and something besides Lubecore.
22 You'll recall that his testimony was that, you know, when
23 Groeneveld lost Fuel Systems as the distributor in
24 Wisconsin, there was some concern -- there was some concern
12:19:54 25 as to whether he would be able to get Groeneveld product,

1 based on things that had been told to him. And so Jim
2 Garvins from FSI came around and pitched him the product,
3 and he didn't go with any other system. He didn't even
4 investigate any other system. He talked about how he had --
12:20:21 5 you know, there was a -- his gas man or oil man has a
6 Lincoln and been trying to sell them on the Lincoln for a
7 long time, but no, he wasn't interested in that product. He
8 wasn't interested in it. He didn't go look for other
9 options besides the Groeneveld. No. He bought the Lubecore
12:20:39 10 because he -- it was to him the Groeneveld. It was to him
11 the Groeneveld.

12 It was a significant factor in his purchasing
13 decision, the fact that it looked to him identical to the
14 Groeneveld product.

12:21:08 15 The Judge has instructed you that on likelihood of
16 confusion, there are a number of factors you can consider in
17 addition to others that you may deem relevant, and to
18 consider them and think about them and weigh them and sort
19 of evaluate where you come out. And I want to address some
12:21:39 20 of these factors.

21 The strength of the Plaintiff's trade dress, you know,
22 people -- people know it when they see it. They know the
23 Groeneveld product when they see it because of the shape and
24 the overall appearance and design of the thing. They know
12:21:53 25 it when they see it. And nothing else looks like it,

1 exactly like it. I mean other than the Lubecore.

2 The relatedness of the Defendant's goods and the
3 Groeneveld goods, there's -- I submit there's really no
4 issue. That the goods are related. How do you know that?
12:22:12 5 Because they do the same thing and they're sold in the same
6 industry. The goods are related. They are both automatic
7 lubrication systems.

8 The similarity of the trade dress. This in our case,
9 of course, is hugely an important factor. Hugely relevant.
12:22:33 10 Nothing else is so similar, nothing even comes close to
11 imitating the Groeneveld product except for the Lubecore.
12 The similarity of them is undeniable despite, despite some
13 attempts to point out little differences.

14 Evidence of actual confusion. Well, there is evidence
12:23:02 15 of actual confusion. And by the way, sometimes people don't
16 know they're confused. People think they understand things
17 perfectly well. They don't know they're confused. So the
18 fact that 8 billion people aren't running around saying "I'm
19 so confused" is not the dispositive issue here.

20 There is evidence of actual confusion here and
21 evidence of some actual confusion is meaningful in that it
22 shows the likelihood of other people being confused and the
23 fact that people can run around and investigate and figure
24 out what's up with the Lubecore, same thing, different
12:23:44 25 thing, is the technology the same, should we break down --

1 the people fact that people can go ahead and investigate it
2 and figure it out doesn't eliminate the likelihood of
3 confusion that's created by the Defendant's infringing
4 product.

12:23:58 5 Marketing channels. Well, I mean I think the
6 testimony's undisputed that they market their product the
7 same way. They both -- both companies use distributors to
8 distribute the product. They use the same kind of -- go to
9 the same trade shows, the same end user, all truck drivers,
10 people who have national fleets, people with smaller fleets,
11 people who are self-employed, you know, own their own
12 trucks, owner operators, marketing channels, and the likely
13 degree of purchaser care, well, you know it's interesting.
14 Maybe it takes four or five sales visits for someone who's
15 brand new to the system, but somebody who knows the
16 Groeneveld and who sees the Lubecore, the testimony of
17 Mr. Osborn for instance shows it didn't take anywhere near
18 the kind of effort. Nowhere near the kind of thoughtful
19 sophisticated, careful analysis of all the systems that
20 maybe new users might engage in. Mr. Osborn saw that it
21 looked like the Groeneveld, and guess what? That was all he
22 needed to really know. He did not investigate further.
23 This I submit to you is relevant evidence on degree of
24 purchaser care.

12:25:42 25 Interestingly, and this is common sense too, people --

1 sometimes people who are -- have been involved in the
2 industry for a long time and are more familiar with the
3 products that are available out there, will be even less
4 careful, just like Mr. Osborn was, because they recognize
12:26:02 5 the product as coming -- as coming from a Groeneveld source,
6 of Groeneveld design, a Groeneveld manufacturing facility.
7 They recognize it because they've been involved in the
8 industry for so long. They don't have to go do rocket
9 science analysis of it because when they see it, that's all
12:26:21 10 they need to know. Just like Mr. Osborn. The Defendant's
11 intent in selecting the trade dress, well we've -- we've
12 gone through that.

13 And likelihood of expansion of product lines. You
14 know, there isn't -- there's territory out there. There is
12:26:51 15 a market out there that's bigger in the United States,
16 bigger than the current base of users, active users of the
17 systems. This factor weighs also in favor of a likelihood
18 of confusion and uncertainty in the marketplace.

19 I would like to talk to you a little bit about
20 nonfunctionality. You know, look. It's a pump, a pump in
21 an automatic lubrication system. It's supposed to do
22 something. It's supposed to deliver grease to greasing
23 points, and it's supposed to work. That doesn't mean that
24 the shape of it is essential to the use or purpose of the
12:27:46 25 product, that it has to be this particular way to carry out

1 its purpose. It -- the shape is not, the appearance is not
2 essential to the use or purpose, delivery of grease. The
3 way it's all put together is not essential to the use or
4 purpose. The silhouette that is created by the way it's put
12:28:18 5 together is not essential to the use or purpose of the
6 product. And there was testimony about that, not only from
7 Mr. Van der Hulst but also from the Defendant himself, who I
8 will concede, demonstrated quite a bit of knowledge about
9 these products, products that he said he didn't give
12:28:44 10 Mr. Martin Vermeulen any instruction on what to do,
11 whatsoever, except give me a grease output of such and such.

12 Even Mr. Eissis says the shape, the shape is not
13 essential to the use or purpose. It could be a different
14 shape and carry out its function.

12:29:16 15 Secondary meaning. Secondary meaning is a -- when
16 people in the industry see it, do they think Groeneveld?
17 That's what that means. And guess what? Everybody said
18 yeah. Everybody said yes. It is unique. It is
19 distinctive. I know it when I see it. I know it's a
20 Groeneveld when I see it. When I said what about you see a
21 Lubecore, you see a Lubecore label on the Lubecore, come on.
22 And they said I -- that shape, that silhouette that design,
23 that overall appearance, that triggers in their mind an
24 immediate association with Groeneveld, and associations like
12:30:01 25 that can be conscious, but they are not always conscious.

1 Exposure to a particular product over years and years and
2 years creates a familiarity, a comfort just like Mr. Osborn
3 testified about that he has, a comfort and familiarity so
4 that they might not know I'll, I think somebody -- somebody
12:30:32 5 said they can't pronounce -- oh, Mr. Marcum, they can't
6 pronounce the name, but they recognize it as something
7 that's been around for years and years and years. Something
8 that's tested and tried and true. So what are the factors
9 on secondary meaning? Direct testimony. Do they know it
12:30:56 10 when they see it? Yeah, they do. There's customer
11 testimony about it. Mr. Osborn, Mr. Orville White, gosh it
12 seems like we've been here a long time. That probably seems
13 a long time ago to you. He was the gentleman who spoke
14 really, really quickly, Sentinel Transportation, the
12:31:16 15 national fleet out there. He's a customer, he buys the
16 things. He recognizes it on sight. This is relevant
17 evidence on this inquiry.

18 We don't have a consumer survey because okay, we don't
19 but that's just one. I expect there will be argument about
20 that, but that's one factor and I'll grant that to you,
21 ladies and gentlemen. They didn't run around asking
22 thousands of customers questions that -- who -- that answers
23 to which probably would have been challenged anyway;
24 exclusivity, length, and manner of use. Has Groeneveld used
12:31:38 25 the design, used its trade dress, exclusively and

1 continuously for the last several decades? The testimony is
2 undisputed that yes, they have, that that overall shape,
3 that overall design, that overall way the thing is put
4 together and presented to the market, they have. We have
12:32:26 5 evidence about the amount and manner of advertising. By the
6 way, the fact that -- that the advertising expenses are
7 incurred by more than just the Brunswick Groeneveld office,
8 that doesn't matter. Why is that relevant? The fact is
9 advertising is being done to create that association, money
12:32:56 10 dollars are being spent on fostering that recognition,
11 putting the name out there, and putting the image of the
12 pump out there. And, you know -- it's relevant, and
13 Groeneveld people have testified consistently how important
14 the image of the pump is to them. Yeah, their name is
12:33:27 15 important too, the Groeneveld name, the G, that's important
16 too. Yeah they incorporate those branding identifiers,
17 those brand identifiers in their advertising as well. And
18 doesn't sound like a bad idea. The fact that that's part of
19 it doesn't mean that the shape and the image of the pump
12:33:46 20 isn't part of it, too. It is part of it, too, and it is the
21 shape that has been consistent throughout the overall
22 presentation of it. Amount of sales and numbers of
23 customers, well, they're a lot of them. You heard testimony
24 about it. I mean they're all over the United States. They
12:34:08 25 are all over Canada. They're all over the world. They -- I

1 can't remember the numbers exactly now, but we're talking
2 about millions and millions of dollars in Groeneveld these
3 items for decades, established place in the market. Well, I
4 mean -- I don't -- I can't -- there's real -- no real
12:34:29 5 serious dispute that they are one of the players in the
6 market. There's no real dispute that Lubecore doesn't have
7 any independent brand recognition of its own. And so,
8 ladies and gentlemen, it's -- the label doesn't tell the
9 people that these are two different entities, that the
12:34:55 10 designs are different, that the sources are different people
11 see it and they think it's the same.

12 And additional layered on evidence as Mr. Osborn
13 explained of the same people making them, the same people
14 selling them, and as Ms. Wolfe explained, the layered-on
12:35:19 15 advertising similarities, marketing channels, all these
16 things, you know, cloak it in this appearance, cloak the
17 Lubecore in the appearance that notwithstanding what someone
18 says to you, they must be coming from the same design, the
19 same source, the same recipe.

12:35:44 20 You know, it's -- the -- Coca-Cola, somebody gave you
21 a bottle of Coca-Cola, the Coca-Cola iconic shape, Coca-Cola
22 bottle, if it looks like a brown carbonated cola liquid
23 substance inside there, the guy selling it to you used to
24 sell you what's called Coke. The people making it made
12:36:07 25 Coke. The guy who was president of Coke now has this new

1 company, and on his Coca-Cola bottle, he puts the label
2 Ed's, Ed's Cola, it's -- it's the wink-wink, nod-nod
3 defense. It's not just for what people say. It's the
4 impressions that they create that contributes to a
12:36:30 5 likelihood of confusion.

6 I mean Dean Osborn basically said yeah, that they said
7 Lubecore was a competitor and they were different, but yeah,
8 I figured -- I figured the technology came along with
9 Lubecore because it looks exactly the same as the
12:36:51 10 Groeneveld.

11 Proof of intentional copying is also relevant on this
12 secondary meaning factor. And the Judge instructed you on
13 various presumptions that you can make, draw, and various
14 inferences you can draw relating to secondary meaning and
12:37:10 15 uncertainty in the marketplace or likelihood of confusion,
16 based on the intentional copying.

17 You can reasonably infer secondary meaning, and you
18 can likewise as to likelihood of confusion, based on if you
19 find that the copying here was intentional. And I
20 believe -- not what I believe, and the evidence supports
21 that finding.

22 Groeneveld carried a Grease Jockey pump -- can I have
23 87, please? Groeneveld carried this Grease Jockey pump. It
24 put its Groeneveld label on it. Mr. Vermeulen said you
12:38:21 25 can't tell anything about a product Groeneveld, whether

1 makes it or where it comes from, from the label. Remember
2 that testimony. Nevertheless, here's the pump Groeneveld
3 carried and sold. Grease Jockey TSI. Do you see -- do you
4 remember all the testimony in this case, people referring to
12:38:42 5 different pumps by different names, notwithstanding whatever
6 labels they are on them. Nevertheless -- and this goes to
7 the likelihood of confusion, by the way, because the label
8 is there, the explanation for all of this.

9 They carried this, didn't like it. It wasn't good
12:39:01 10 enough. Everybody said it wasn't good enough. By the way,
11 this looks nothing like any of the three Groeneveld pumps
12 you see on the table before you. They decided to make their
13 own product. They went into a project with another company,
14 Sempress, they made a couple -- did that for awhile. They
12:39:19 15 didn't like that either. Mr. Van der Hulst testified that
16 he and his team developed this generation. The PX-143 and
17 the six-liter is PX-1 when Mr. Vermeulen wasn't even there.
18 1981, 1982, by the way, the fact that some of the older
19 versions might have still been around, so Mr. Eissis had
12:40:44 20 some to sell in Canada when he joined the company, I guess
21 six, seven years later. That doesn't mean that the new
22 generation was not developed and designed by Groeneveld as
23 Mr. Van der Hulst testified in that case, 1981 and '82. It
24 was on the market. They start selling it in 1982 and 1983,
12:41:13 25 and they start selling it in North America in 1985.

1 Mr. Vermeulen says he joined the company in Groeneveld
2 1984. Well, he wasn't there in 1981 or '82 when the product
3 that's at issue in this case was designed and developed.
4 And by the way, he never worked where production took place
12:41:48 5 in the factory, in Italy. And he testified to that. And
6 you heard no testimony from him identifying either one of
7 those two earlier pumps as the things that existed before he
8 got there.

9 Mr. Van der Hulst's testimony was not challenged on
12:42:15 10 this issue during cross-examination. He was not shown these
11 predecessor pumps when he came to testify. Those only came
12 out when he was back on the plane to Italy.

13 Ladies and gentlemen, I figured this out, the dates,
14 the dates as Mr. Vermeulen has testified to when he was
12:42:53 15 employed by Groeneveld. They don't make sense. The
16 testimony doesn't make sense, and I'm going to show you how.

17 First of all, Groeneveld's employment records, as you
18 heard Ms. Wilson testify about, show that he worked for the
19 company November, 1986, to 1995. There's been no challenge
12:43:23 20 to the validity of these records. That's one. So even --
21 so if he joins Groeneveld in November of 1986, even by his
22 own testimony, the new system was already developed before
23 he even got there. That's one.

24 Two, Mr. Vermeulen's dates are just all wrong. They
12:43:57 25 just don't add up. He says he was there until 1997.

1 Mr. Vermeulen testified that he was with Groeneveld until
2 1997 even though the records show him gone in 1995. I have
3 a transcript of his trial testimony. I'm moving this.

4 "Question: How long have you been affiliated with Tae
12:44:43 5 Sung?

6 "Answer: This month, 20 years."

7 This month, he gave the testimony October 4, 2011.

8 2011 minus 20 years is 1991. He says he was with Groeneveld
9 in 1991. But, he also says he was with Tae Sung in 1991.

12:45:16 10 That's one.

11 He says he was hired and started at Groeneveld in
12 1984, and that he completed that project pretty quickly
13 after that. Mr. Eissis testified that the system wasn't
14 even available, and he didn't start selling it until 1990.

12:46:05 15 He says he didn't even start selling it until two years
16 after he, Mr. Eissis, joined Groeneveld. Mr. Eissis says he
17 joined Groeneveld in, I think, he says 1988. Yeah, so
18 Mr. Eissis says the old system was the one that was being --
19 was -- that the new system hadn't come out yet in 1988.

20 But, according to Mr. Vermeulen's testimony, he would have
21 done that in 1984 and 1985. This is inconsistent. There's
22 one more.

23 Mr. Vermeulen testified about the generational gap
24 between his purported design of the Groeneveld pump at issue
12:47:15 25 in this case, and his purported design and engineering of

1 the Lubecore pump that is at issue in this case. He said
2 there is a 30-year generational gap. Thirty years. He says
3 he designed it in 2008. Thirty years from that, 1981. It
4 doesn't add up.

12:48:02 5 In addition to these dates not adding up, I submit to
6 you that Mr. Vermeulen's testimony was not worthy of your
7 belief that he is the designer of the system.

8 He -- it is simply not credible that someone starts
9 with a measurement, makes a piston and has to create
10 something around it that ends up looking exactly like the
11 Groeneveld pump. It's just not credible. It's not credible
12 that he didn't use reverse engineer pump or use a Groeneveld
13 pump or a Groeneveld drawing. It's not credible. He didn't
14 say yeah, we came, we broke down the Groeneveld pump, and we
15 measured everything and made our own drawings from that and
16 made it -- he didn't say that. He said absolutely not. He
17 said he independently designed it from scratch, from a
18 calculation we did on a piece of paper on a plane ride back
19 to Korea from Amsterdam, and then a couple months later, he
20 had to work a prototype, and then the thing is on the market
21 without even, I guess, doing much testing because he sure
22 got to market pretty quickly.

23 Well, you don't have to test it if somebody else has
24 done all the testing for the last 30 plus years. You don't
12:49:37 25 have to do any testing. Although, maybe they should have

1 because you, as you know, they end you said with some pumps
2 that didn't work out so well. That leaked, had O-rings that
3 had quad rings instead of O-rings, nothing that you could
4 see but things that were meaningful, meaningful differences.

12:50:17 5 You are also going to be asked to evaluate the
6 credibility of the witness that we put forward to you,
7 whether you believe them or not, whether you thought they
8 were telling you the truth, whether you thought they were
9 playing games with you, whether not only the witnesses we
12:50:39 10 put forward on this but Defense witnesses as well, who do
11 you believe. Who played games? Who tried to answer
12 questions and cross-examination questions in a straight
13 forward, helpful way? Who wanted to do a dance to confuse
14 things?

12:50:56 15 MR. ANASTOS: Objection.

16 THE COURT: Overruled.

17 MS. MICHELSON: No dancing is needed if the
18 truth is on your side.

19 I have to talk about damages and damages numbers. By
20 the way, ladies and gentlemen, here's the confusion, here's
21 the confusion. Customers think you can put part
22 interchangeably together. Exhibit 61-2.

23 MR. KUNSELMAN: Can we get the Elmo on,
24 please? Thank you.

12:52:16 25 MS. MICHELSON: If parts aren't

1 interchangeable, if they aren't used as well when put
2 together, then people are confused, customers are confused
3 if they think otherwise and if they act otherwise. People
4 are confused when a warranty program says if you use our
12:52:36 5 grease, then we'll -- you got your warrant, your extended
6 warranty. If you're using the Lubecore, if you're using the
7 Groeneveld -- and by the way, if your Groeneveld pump has
8 any problem because you're using our Lubecore grease, we'll
9 come out and our people will fix it, our people will put our
12:52:55 10 parts in if any needs to be replaced or repaired. Our
11 people will warrant the Groeneveld product. Our product,
12 the next generation, the next generation in ALS, we warrant
13 that product.

14 So was there some actual confusion that we proved
12:53:32 15 where somebody thought it was the same thing or just as good
16 or the technology was the same when they bought it because
17 that's what they thought, they were comfortable with it?
18 Yes, there is evidence in the case before you, and you can
19 reasonably conclude from all of what you've heard and all
12:53:49 20 that you see, and using your own common sense, which the
21 Judge has charged you is infinitely appropriate for you to
22 do in this case.

23 But, there is a likelihood of confusion and
24 uncertainty in the marketplace. Always all he's got to do
12:54:04 25 is change the way the thing looks on the outside. That's

1 it. That's it. That's it. Why wouldn't he do it if he
2 doesn't want it to look different? He says he wants it to
3 look different. He says he wants it to be distinguished
4 from the Groeneveld. Well, we heard of so many witnesses
12:54:25 5 saying that they don't distinguish it from the Groeneveld.
6 They think they're the same thing. If he really wanted it,
7 people could think otherwise, why wouldn't he just change
8 something about the shape of it, the silhouette, something?
9 And it's not because he doesn't have to. Because he also
12:54:41 10 said that he could. He also -- he, Mr. Eissis, said well
11 yes, the shape can be different, notwithstanding the
12 internal working, mechanical components of the system.

13 Now, the Judge charged you on damages. He told you
14 about who's got to show what and who's got to peel things
12:55:10 15 away and those sorts of things, and that you can consider
16 when you decide which calculations to accept -- can I see --
17 can I see that? I don't want to misstate that. Can I see
18 that chart?

19 Here's what we got, ladies and gentlemen. When the
20 question -- when the request for information was made a long
21 time ago, more than a year ago, we got a chart, a summary,
22 these are Lubecore's numbers, these are Mr. Eissis' numbers
23 showing gross revenues in 2010, gross revenues projected in
24 2011. It was almost year end in 2010. So any projections
12:55:58 25 in 2010 should have been reasonably accurate. This is what

1 we got. And we didn't get anything on 2009, by the way,
2 nothing except some testimony from Mr. Eissis that he sold
3 200 of the systems in the United States in 2009.

4 And by the way, you know, I heard something along the
12:56:25 5 lines that oh, there was just a projection or that it was --
6 you're not projecting at the end of 2010 what you did in the
7 past in 2009. That's just nonsense. His testimony under
8 oath was 200 pumps, 200 systems were sold in the United
9 States in 2009, and no contrary information was provided
12:56:54 10 until two days before trial, in a document, Defendant's
11 Exhibit X, please.

12 MR. KUNSELMAN: It's here.

13 MS. MICHELSON: No, Defendant's Exhibit X.
14 Has no backup supporting documents. It's not any reference
12:57:22 15 to any -- Mr. Eissis didn't prepare it himself. There's no
16 testimony that he verified personally the accuracy of any of
17 the information in here. I submit to you, ladies and
18 gentlemen, based on what you heard, and what you saw in this
19 courtroom, it is reasonable and appropriate and compelling
20 to use these numbers that he presented and it was
21 appropriate when Groeneveld gave you its damages
22 calculations for Groeneveld to rely on what he said, what he
23 said under oath. You know, he swore to the accuracy of this
24 under oath when he testified about it during his deposition
12:58:22 25 a year ago. Which one is it? Which testimony is true?

1 Which one isn't true? Which -- which one maximizes the
2 numbers when there's an interest in maximizing them, and
3 then two days before trial, minimizes or tries to minimize
4 them when there's an interest in minimizing them?

12:58:46 5 Is this credible? Are these, Defendant's Exhibit X,
6 can you rely on these as real numbers? Why should you and
7 why would you? Why would anybody? And so -- by the way,
8 the damages aren't what profit is left when you take all
9 kinds of expenses out that have no proper place in a damages
12:59:29 10 calculation for the kind of claim that we have here.

11 The Judge very specifically told you in his jury
12 instruction what Defendant's expenses are, the appropriate
13 expenses to offset against gross revenues. You -- you --
14 you can't tell from looking at this what the appropriate
12:59:53 15 expenses are. And you can tell from looking at this that a
16 number of -- this, meaning Defendant's Exhibit X -- that a
17 number of them that he tries to patent there and include in
18 there are not within the Court's definition of what an
19 appropriate deduction or offset or expense is.

13:00:11 20 And by the way, the Judge also told you that it's
21 their burden to show what those offsets are. To give you
22 competent credible evidence, reliable evidence, so that --
23 to offset it, and if they don't, you are entitled to -- and
24 if they don't, Groeneveld is entitled to an award of the
13:00:48 25 gross revenues and as Lubecore's profits because

1 Groeneveld's entitled to the compensatory -- its own actual
2 damages, including its lost sales damages, which we'll go
3 through that in a second. It's entitled to Defendant's
4 profits on sales of the infringing product, and it's
13:01:16 5 entitled to damages for corrective -- corrective expenses
6 that Groeneveld had to incur to sort of try and -- try and
7 correct the misperceptions and the confusion going on in the
8 marketplace. And you'll recall testimony from Ms. Wilson on
9 that point that she estimated between 18 to \$20,000. And so
13:01:36 10 Groeneveld does request that you include that in your
11 damages award.

12 So Ms. Wilson, Gail Wilson, the CFO of Groeneveld, who
13 you -- I'm sure when you do your job of deliberating will
14 consider her demeanor on the stand, the way she carried
13:02:22 15 herself, her attempt to answer questions the best way that
16 she could, her forthcomingness when you evaluate whether you
17 believe what she told you. And by the way, there's no
18 evidence that she has any personal financial interest in the
19 outcome of this case, unlike the Defendant.

13:02:47 20 She relied on Lubecore's number when she made her
21 calculations. First, the 2009 sales of 200 units, 200 ALS
22 sales that Mr. Eissis testified he made in the marketplace.
23 And an average selling price of 1500 per unit when it goes
24 through distributors, more by the way when they go to end
13:03:15 25 users, but we're not asking for that. We're not even asking

1 to go that far. We're not asking for every single dime.
2 This is a conservative estimate based on information that
3 they provided; 200 products times 1500, \$300,000 with the
4 margin of 41.3 percent, \$123,900. I want you to write these
13:03:45 5 down, and I'm going to add them up. She went through with
6 how she calculated her contribution margin, the steps she
7 took, the care that she took. The conservative approach
8 that she took. The records she relied on, her personal
9 knowledge of Groeneveld's records, her personal involvement
13:04:14 10 with creating and maintaining them. That's \$123,900. Based
11 on Defendant's reported gross sales of its infringing
12 product in the United States in 2010, \$1,042,088.01 that
13 Lubecore reported were its gross sales, projected would be
14 its gross sales and never until the 11th hour when trial's
13:04:55 15 going to start, try to say something differently. Their
16 reported gross sales, she -- she took out sales that
17 wouldn't have gone through the Brunswick office. She took
18 that out. We took that out and came up with a gross sales
19 figure in this amount, multiplied it, came out with \$367,000
13:05:25 20 in 2010, went through the same -- better write that one
21 down -- went through the same process on the 2011 reported
22 numbers by Lubecore and came up with \$734,727.

23 I submit to you, ladies and gentlemen, that your
24 damage award to Groeneveld for amounts incurred to date or
13:05:56 25 through 2011, based on Lubecore's reported sales figures to

1 which they have not adequately demonstrated or credibly
2 demonstrated, they are entitled to any setoffs or deductions
3 or offsets whatsoever, is -- oh, I think I did it --
4 \$1,225,627.

13:06:32 5 There was additional testimony from Dr. Burke as to
6 his regression analysis of going forward, damages caused by
7 the infringement. Based on his experience and statistical
8 analysis, his reliance on Groeneveld's financial data, all
9 of which he had access to. And Lubecore's reported figures
13:07:02 10 and his going forward, and there was testimony from Ms.
11 Wilson of a five-year -- a five-year time period for the
12 market to adjust itself, meaning for the damage caused by
13 the infringing product to sort of settle down, five years
14 his five-year figure of total -- his five-year figure of
13:07:41 15 Groeneveld's lost sales damages is this number.

16 MR. ANASTOS: Is this an Exhibit, your Honor?

17 MS. MICHELSON: I thought this was in. And
18 we're -- look, he did calculations all the way out for ten
19 years. Groeneveld isn't even asking you to go that far.
13:08:02 20 They're conservatively asking you for \$2,806,326 to correct
21 the marketplace for the five years.

22 I did -- plus the 18 to \$20,000, and I'll leave it to
23 you to decide whether you want to do 18 or 20, for the
24 corrective action that Ms. Wilson talked about. And there's
13:08:37 25 one more piece of it as we explained on Lubecore's profits,

1 the law allows for disgorgement of profits if you find that
2 there is infringement.

3 Lubecore's profits are its gross sales minus what
4 Lubecore demonstrates are appropriate credible and reliable
13:08:56 5 offsets. Lubecore has not demonstrated any such thing, that
6 there are any. So the numbers we ask you to return on that
7 item are their reported figures, their gross revenues in
8 2010, 2011, and the numbers are here. And you can take them
9 with you when you go into the jury room.

13:09:45 10 So, ladies and gentlemen, I do thank you for your
11 patience. I probably talked a long time. I'm doing my
12 best. Here the issue is simple for you. It really is. Is
13 it an intentional copy? Is it nonfunctional? Is the trade
14 dress that Groeneveld is claiming, does the shape of the
15 thing make it work? Is it essential to the use or purpose
16 of the product? Is the shape of it the thing that makes it
17 work? The silhouette of it, the overall appearance, the
18 testimony before you is it's not.

19 Is there secondary meaning? Do people look at it and
20 go wow, it looks like a -- it's a Groeneveld, I recognize it
21 on sight because it's a Groeneveld? I do recognize it on
22 sight as a Groeneveld, notwithstanding the label there, the
23 label not being there, whether it's dirty, whether it's
24 clean, whether it's on a truck. The evidence before you is
13:10:49 25 yes, they do. And is there evidence that there's a

1 likelihood, a likelihood, we don't have to prove actual
2 confusion to prevail, is there a likelihood of confusion or
3 uncertainty in the marketplace caused by Defendant's
4 intentional imitation of the Groeneveld trade dress and?
13:11:14 5 The evidence before you is there is.

6 So we will ask you to return a verdict in favor of
7 Groeneveld on its trade dress infringement claim and award
8 damages to Groeneveld in the amounts I have identified, that
9 these calculations appear on the exhibits you will take with
13:11:37 10 you. And I thank you once again sincerely.

11 THE COURT: Thank you. All right, folks. I
12 will let you go to lunch. So keep in mind the admonitions.
13 It's really important now that you've heard a lot of stuff,
14 you haven't heard it all. 2:15 we'll meet downstairs. Will
13:11:52 15 that be good, Chris?

16 DEPUTY CLERK: Um-hum.

17 THE COURT: Can't see if Mr. Yarger's awake.
18 If he is, tell him 2:15.

19 (Thereupon, a luncheon recess was had.)

14:22:50 20
21
22
23
24
25

1 Thursday Session, October 20, 2011, at 2:15 P.M.

2 THE COURT: Okay, Mr. Anastos. You may
3 proceed.

4 CLOSING ARGUMENTS ON BEHALF OF THE DEFENSE

14:23:16 5 MR. ANASTOS: Good afternoon, ladies and
6 gentlemen. When I started my opening statement last
7 Thursday, when we all first met for the first time, I asked
8 you to look at the two pumps at issue in this case and ask
9 yourself without raising your hand or otherwise indicating
14:23:29 10 if you can tell the difference between the Groeneveld pump
11 and the Lubecore pump. I'm going to ask you that again
12 without any -- don't raise your hands. Don't indicate.
13 But, can you tell the difference between the Groeneveld pump
14 and the Lubecore pump? And I'm sure the answer is yes, and
14:23:43 15 we all can, because it's distinguished.

16 There's been -- Ms. Michelson's argument, she says
17 what jumps out at people about these pumps is the shape.
18 And ask yourself when you look at the Lubecore pump, what
19 jumps out at you as identifying it's a Lubecore pump is the
14:23:59 20 shape or the Lubecore red label, the Lubecore trademark on
21 it in red, the red follower plate, and the Lubecore logo
22 down lower on the identification plate? Is it the shape or
23 is it all the red stuff and the Lubecore name that you use
24 to identify it as the Lubecore pump?

14:24:18 25 You've been instructed that the Plaintiff needs to

1 prove three things in order to win their case. And the
2 first item on the list is what's called nonfunctionality.
3 They have to prove that there's something nonfunctional
4 about the design of their pump, something that is an
14:24:41 5 arbitrary embellishment to this, something that's
6 ornamental, something that's there for some reason other
7 than engineering reasons, other than engineering influences.

8 The first thing I think I want you to ask yourself is
9 which pump was Mr. Van der Hulst talking about when he
14:25:05 10 testified that a new pump came into existence by Groeneveld
11 in -- I don't know. I think he said the early 1980s, they
12 moved from the one they were using and selling to Grease
13 Jockey. I think it should be pretty transparent by now that
14 it was not the pump that we're talking about in this case.
14:25:26 15 The pump we're talking about in this case was not introduced
16 to the market until the 1990s, and the reason we know that
17 is that Mr. Eissis, who nobody disagrees first became a
18 Groeneveld distributor in 1988, was not selling the pump
19 that was at issue in this case. He was selling the second
20 pump in the lineup there, the one with the all plastic lid
21 and the screw downs for the screw ins's for holding down the
22 reservoir.

23 Ms. Michelson said in her -- in her closing that we
24 really don't have to believe Mr. Eissis -- no. We can
14:26:06 25 believe Mr. Eissis that he was selling the pump there in

1 1988, but that doesn't prove that the pump that is at issue
2 in this case really didn't exist in 1988. It somehow
3 existed in '81 or '82, but Mr. Eissis was selling the
4 earlier version in 1988. Now, does that make any sense to
14:26:27 5 you? That would be like walking onto a Ford dealer lot
6 today and when the 2011 models are out, and that Ford dealer
7 selling 2004 models because they were left over and Ford
8 wants to sell them, selling them as new on his lot. That
9 makes absolutely no sense. When the new models come out,
14:26:46 10 every manufacturer wants that new model to be sold. So the
11 current model when Mr. Eissis was selling them in 1988 was
12 Pump Number 2 and the new pump was not made until -- or
13 wasn't released to the public until the 1990s. These things
14 are grease pumps. Mr. Vermeulen and Mr. Van der Hulst both
14:27:11 15 testified unequivocally that it would cost more to
16 manufacture these in a different way. And that only makes
17 sense from a manufacturer perspective.

18 You -- someone who is selling a Groeneveld pump wants
19 to acquire it, have it made, have its cost of goods be as
20 low as possible, the testimony here from Mr. Van der Hulst
21 and Mr. Vermeulen is that the basis of these pumps optimize
22 the amount of aluminum necessary to enclose the working
23 parts and to make room to have the valves and other things
24 screwed into it. No more material is used than needs to be
14:27:57 25 used and no less material is used than needs to be used. If

1 you use less, you risk the thing blowing up because of the
2 air pressure inside. If you use more, it costs more.

3 If someone wants to make something ornamental, they
4 put more into it. They make it cost more because they want
14:28:12 5 it to be nice and people to buy it because it looks nice.

6 We all know these things could have been made to look nicer.
7 The base could have been rounded off with aluminum, but if
8 you added another round of aluminum on the whole outside of
9 the diameter of that base, consider it, how much would it
14:28:29 10 have added to the cost of the item and would that have put
11 the seller at a disadvantage because they would have had to
12 pay more to acquire their product and would not have been
13 making as much profit in the end?

14 With respect to Mr. Van der Hulst's testimony, look at
14:28:52 15 the first three pumps in line. You have to ask yourself
16 which pump was he talking about when he testified that he
17 wanted, or Groeneveld wanted to make a pump that looked
18 distinctive. Now, if it's the first pump in line there,
19 which I think the time line demonstrates was the pump that
14:29:08 20 Mr. Vermeulen was talking about, then that's their
21 distinctive pump. Is it distinctive? Looks like a grease
22 pump like all the grease pumps we have seen in this case so
23 far. Is it the second pump? Is that the one that's
24 supposed to look distinctive? Which one of those was
14:29:30 25 Mr. Van der Hulst talking about when he said that he was

1 ordered -- they drew designs and wanted to make something
2 that looked nice? It has to be that first pump. So that's
3 the one they wanted to make look nice, then Mr. Van der
4 Hulst's testimony is utterly irrelevant to this case. The
14:29:46 5 testimony for Mr. Vermeulen and actually from Mr. Van der
6 Hulst was that all of these things are made out of
7 functional pieces that are put together to make a functional
8 unit. The base is larger than it has to be. The size of
9 the base is driven by the internal components, and the other
14:30:05 10 things that need to be attached to it, the check valves, the
11 pressure valves, the input of the hydraulic from below,
12 all -- the main line going out.

13 The base is made so that it can accommodate a grease
14 pump and accommodate the air pressure that drives the grease
14:30:21 15 pump and accommodate all of the things that are needed to
16 work that pump and test the air pressure. Where does the
17 reservoir come from? We talked about that in detail with
18 Mr. Van der Hulst. You start with a certain -- you start
19 with a certain circumference to the -- to the -- excuse me.
20 Certain area to the base of the reservoir. How is that area
21 determined? It's determined by the size of the base. You
22 don't want the reservoir to be bigger than the size of the
23 base because then you'd have to expand the base with more
24 material which would cost more. So you make the area of the
14:30:42 25 bottom of the reservoir to fit nicely on top of the base,

1 and then how tall is that base? How tall is that reservoir?
2 That reservoir height is dictated by the amount of grease
3 that that unit holds to last a certain interval in a truck's
4 service life. So that when a trucker goes out on the road
14:31:16 5 and drives X-thousand miles, he'll use up all the grease in
6 it, come back and have it filled up at his next service
7 stop. It's not fancy. It's not ornamental. The size is
8 dictated by engineering reasons entirely.

9 The follower plate is dictated by engineering reasons
14:31:34 10 entirely. That's not ornamental. We all know what that
11 does. It just goes up when the grease gets pumped in and
12 comes down and assists the grease in, coming out, when it's
13 being sucked out and pumped through the greasing systems.

14 So now we have the final pumps that are at issue in
14:31:56 15 this case which are actually the second -- excuse me, the
16 third and fourth in that line there, the third fourth and
17 fifth with just the different size, the different size
18 reservoirs, which again the different size reservoirs are
19 dictated by how much grease. One of them is -- one of them
14:32:13 20 is the size correlated with X-thousands of miles of a truck
21 driving between one service level and another, and the
22 larger one is correlated with Y-number of miles for a truck
23 to drive between service levels. So, you know, if someone
24 really wanted to make one of these things ornamental and
14:32:33 25 start with all of the engineering principles that go into

1 why that reservoir is the same shape it is, they could have
2 made it like eight feet tall or three feet tall or some
3 height totally unnecessary to the amount of grease, that it
4 holds no one has done that and a reason no one has done that
14:32:50 5 because there's nothing whatsoever ornamental or arbitrary
6 or fanciful about the design of any of these pumps. They're
7 all designed by engineering necessity.

8 Oh, yeah, there was insinuation in the opposing
9 party's closing that we ambushed them with the earlier
14:33:15 10 versions of the Groeneveld pump. I guess I ask you folks
11 did we ambush them with those earlier versions of the pump
12 or did they hide them from you because they destroyed
13 Mr. Vermeulen's testimony -- excuse me, destroyed Mr. Van
14 der Hulst's testimony because in 1980, Mr. Van der Hulst did
14:33:37 15 not make the pump that is at issue in this case in the early
16 80's. He made Number 1. Somewhere there was a change along
17 the way to make Number 2.

18 Number 2 is still in existence in 1988, and -- because
19 we know that because Mr. Eissis was selling it in 1988. He
14:33:53 20 was buying it from Groeneveld and selling it in 1988. And
21 Pump Number 3, according to Mr. Eissis, came out in the
22 early 90's. That is entirely consistent with
23 Mr. Vermeulen's testimony. I don't care about, you know,
24 did Mr. Vermeulen get his years of employment with
14:34:11 25 Groeneveld off by a little bit. Does that matter a lick in

1 this case? What matters is the testimony that he was part
2 of the team. No one has said Mr. Vermeulen was the one who
3 designed anything. He was the part of the team that created
4 the version of the pump, who engineered the version of the
14:34:28 5 pump that's at issue today, the one that has the follower
6 plate, the one that has the engineering gusto that -- that
7 is there in the Pump Number 3. He testified that everything
8 about it is functional. He testified that they were under
9 no orders whatsoever from the company to make anything nice.
14:34:49 10 They were under orders to make a good pump at the optimal
11 price, and that's exactly what they did. Let's face it,
12 folks. These are grease pumps and nothing more than that.
13 Mr. Van der Hulst wanted them to be automobiles, something
14 with an outside form to them that covers up all the nice
14:35:20 15 inside stuff or the -- or the bad inside stuff, something
16 that, you know -- we all know you peel away the outer shell
17 of an automobile and what looks -- underneath it is the guts
18 of the -- the guts of the thing, the thing that makes it
19 run. But, all of those have covers on them. What you do
14:35:37 20 with the body is to put your distinctive design on it and
21 make it look like whatever BMW wants to make it look like or
22 Ford wants to make it look like or what Buick wants to make
23 it look like or whoever wants to make it look like. There's
24 no outside show on this covering up of the guts. The thing
14:35:55 25 is itself, and it is itself only because of the engineering

1 influences.

2 Let's move on to secondary meaning. Groeneveld has to
3 prove that in the eyes of the public, the relevant public,
4 when somebody looks at the Groeneveld pump, they associate
14:36:25 5 it with Groeneveld based solely on its shape. And I'm
6 getting the feeling from listening to the Plaintiff's
7 closing that Steve Osborn is the only person who
8 testified -- who testified -- Dean Osborn is the only person
9 who testified in this case, and that their case hinges 100
14:36:46 10 percent on one person's testimony. Frankly, I'm not sure
11 his testimony even was as represented. My recollection of
12 Mr. Osborn's testimony was that he knew and understood
13 entirely that he was purchasing Lubecore pumps. He knew and
14 understood entirely he was purchasing them from one
14:37:06 15 distributor and that he had purchased Groeneveld pumps from
16 a different distributor. He basically said I kind of like
17 both these guys, and I'm trying to give each of them a
18 little business. There was no evidence that he was confused
19 whatsoever as between the two pumps.

20 Mr. White's testimony on secondary meaning was that
21 the look of this pump was iconic in the trucking industry.
22 It reminded him -- can we switch? -- reminded him of the
23 '57 Chevy Bellaire. It was -- it's that important.
24 Everybody in the world recognizes it just like they
14:38:06 25 recognize the '57 Chevy Bellaire. He also said it's as

1 iconic as the '67 Mustang. Now, I got to wonder if there's
2 any trucking people sitting around the truck stop over a cup
3 of coffee and saying boy, "Do you all remember when that
4 Groeneveld pump came out in 1990? I sure would like to have
14:38:33 5 one of those now. I hope that I can get one at a convention
6 of historical convention of grease pumps."

7 No one's doing that. The look is not iconic. It's a
8 grease pump. The people who -- many of the people who
9 testified that they associate the Groeneveld pump with the
14:39:03 10 secondary meaning of the Groeneveld pump, meaning the look
11 of it itself identifies it with Groeneveld, are people who
12 had been around the pump for a thousand years. I would
13 expect -- in fact, I would be shocked if the outcome was
14 otherwise -- that every Groeneveld employee who's been
14:39:25 15 working the last ten, 15 years, two years, five years, who
16 cares, that every Groeneveld employee who's been around that
17 pump for any period of time recognizes it by the shape.
18 There's no surprise there. So that's Mr. Wapenaar, Ms.
19 Wilson, Mr. Van der Hulst.

14:39:39 20 Mr. White testified that he recognizes the shape as a
21 Groeneveld, but he's a fleet truck owner. I can't remember
22 if it was Conoco or something, and how many thousands of
23 trucks he has and how many thousands of Groeneveld pumps
24 he's bought. Boy, I hope he does recognize the pump by the
14:39:58 25 look of it, but those are aren't the people we're talking

1 about here. We need to find people, and there are none of
2 them presented to you at all that are consumers or potential
3 consumers of this pump in the trucking industry who would
4 have come to you and said yeah, I recognize that pump by the
14:40:17 5 look.

6 The fact that there was none of those put in front of
7 you should tell you something. The people who testified
8 about the look other than Mr. Osborn -- who also had been
9 buying Groeneveld pumps for a number of years, so he
14:40:30 10 probably very much should recognize it by the look. There's
11 nobody who came in here not 100 percent familiar and
12 saturated with the look of the pump who came in and
13 testified that I have -- I recognize that pump just by its
14 silhouette, whether it's dirty or clean, whether it has the
14:40:47 15 label on it or not.

16 Let's talk about the label. The testimony in this
17 case from a number of Groeneveld people is that this pump is
18 their flagship. It appears everywhere. It is Groeneveld.
19 It is the symbol of Groeneveld. Well, as we looked at some
20 of the marketing materials, that just isn't true. This is
21 Plaintiff's Exhibit 6. This is a brochure for a Groeneveld
22 pump. It's not the EP-0 pump. It's the Compalube, and
23 that's why the picture is on the brochure. So when you go
24 back and look at the Plaintiff's Exhibits that have the EP-0
14:41:39 25 pump at issue in this case on them, please remember

1 Mr. Wapenaar's testimony. All of those pictures, all of
2 those exhibits are sales literature for that particular
3 pump. But, when we expand a little bit beyond that
4 particular pump, the whole story starts to crumble.

14:41:56 5 Remember this one. This is Groeneveld's service truck. On
6 one side -- and I can't even see. Is that the EP-0 or the
7 other one?

8 MS. ZUJKOWSKI: That's the other one.

9 MR. ANASTOS: One side of the truck, there's
10 not the EP-0 pump. There's a different pump. And on the
11 other side of the truck, there's the EP-0 pump. So which
12 one's the flagship, which one are they trying to attract
13 attention to? And by the way, which one has ever been shown
14 without a label on it? None of them have ever been shown in
15 any sales literature or even to you, which is kind of odd,
16 even to you without a label on it. The reason you recognize
17 those pumps sitting before you today is because of the
18 label.

19 Remember this one? They were some kind of a trailer
20 used at trade shows or going to be used at trade shows.
21 What's the lineup of pumps on the side of it? There's a
22 bunch of them and nothing at all that attracts any attention
23 to the EP-0 pump that is supposed to be the flagship and
24 supposed to be infused with Groeneveld's secondary meaning.

14:43:08 25 Remember this? Another piece of sales literature.

1 When they're trying to tell the EP-0 pump, of course, they
2 focus on that. When they're trying to sell their products
3 generally, what do we see? Six pumps. No particular
4 attention being attracted to the one EP-0. And, of course,
14:43:26 5 again, they all have the big green Groeneveld label on them.
6 We showed you the web page. Now, there's an interesting
7 piece of advertising. There was a policy that the EP-0
8 serve as the image for Groeneveld. I think Ms. Wilson
9 testified to that. Then we went to the web page, and what
14:43:53 10 do we find in the web page? The first page of the web page
11 didn't have the EP-0 number anywhere. I don't know if you
12 notice it, something in the corner or the side that
13 Groeneveld was celebrating 40 years, some kind of a 40-year
14 anniversary. If it was a 40-year anniversary and they were
14:44:11 15 trying to tout their image that has supposedly been their
16 corporate image for the last, I don't know what they're
17 testifying, 30 years, I guess I would have expected to have
18 seen that pump on the front page of the web page. It wasn't
19 there. And when we dug into the truck greasing pumps, there
20 were a couple of them available there, not just the EP-0,
21 the twin. I think it was the other one. And again, there
22 was no particular attention brought whatsoever to the EP-0
23 pump, and again, it's being sold with its label on it.
24
14:44:42 25 So if this pump has so much secondary meaning because
 of its silhouette, why don't they show it with its

1 silhouette and not the name on it? If the whole world is
2 supposed to be able to recognize it by the way it looks in
3 its silhouette, then you think you'd see it someplace in
4 literature without the label on it.

14:45:06 5 You can put the advertising of that one. One of the
6 factors that you may consider in the secondary meaning
7 element here is the amount of advertising dollars that
8 Groeneveld spends on -- or the amount of dollars Groeneveld
9 spends on advertising.

14:45:26 10 Now, in 2009, the total expenditures for advertising
11 in the U.S. was about \$18,000. You see that? Is that odd;
12 \$18,000 for the whole United States for the whole year?
13 Divide that by the number of months. How much is it? It's
14 not very much. And then you look at those advertising
14:45:59 15 dollars, and besides being insignificant, think of two more
16 things. First, you have no idea looking at those
17 advertising dollars what percentage or even if one dollar
18 was actually used to advertise the EP-0 pump. Second, you
19 have no idea -- probably have a pretty good idea by now that
20 none of those advertising dollars were used to advertise the
21 pump without the label on it. So Groeneveld is making no
22 effort to convince the public to rely on its label in --
23 excuse me -- to rely on its silhouette of its pump to
24 identify that pump as a Groeneveld product. In fact, it's
14:46:41 25 patently obvious what they're doing is wanting the public to

1 rely on the green label on the pump to identify it as the
2 Groeneveld pump.

3 You can -- I invite you to assess the evidence of
4 intentional copying in this case. Please. I mean --
14:47:09 5 consider everything Ms. Michelson said and everything you've
6 heard in this case.

7 The words from Mr. Vermeulen were that he was under no
8 instructions to copy the Groeneveld pump. The words from
9 Mr. Eissis were the testimony was that he did not instruct
14:47:28 10 Mr. Vermeulen to copy the Groeneveld pump. What these
11 guys -- what Mr. Eissis wanted, as testified by him and as
12 by Mr. Vermeulen, was a pump that was a good working pump
13 that had design features that were incorporated from many
14 different pumps. Mr. Eissis testified at length as to --
14:47:55 15 and so did Mr. Vermeulen, as to what design features were
16 changed and added to his pump the Lubecore to make it what
17 he considers a superior product. I won't go through all of
18 them, but the reservoirs are different material. The base
19 is a different material. It's more corrosion proof
14:48:14 20 material. The mounting bracket on the back has bushings in
21 it and an insulation thing to help make sure it doesn't fall
22 off of trucks. The follower plate is made of a different
23 material. The outside of the follower plate is made of a
24 different material. The guide rod that holds the follower
14:48:34 25 plate is made of a different material. There were different

1 performance things that Mr. Eissis identified that it came
2 out to look like it did is no surprise. Why is it no
3 surprise? Because Groeneveld set about to do the same thing
4 when it made its pump, to make a good pump. And the same
14:48:52 5 guy who was involved in making a good pump for Groeneveld
6 years before, a guy who then spent the next 20 years or more
7 of his life working in the automated lubrication system
8 business and who testified that he makes parts and pumps and
9 designs things for all sorts of people, he was involved in
14:49:10 10 the design of this. It should come as no shock that the
11 first thing he would have thought was well they want a good
12 pump, I better start with -- start my thinking where would I
13 begin to make a good pump and that something that looks like
14 the Groeneveld pump was the end result of it. And even if
14:49:15 15 you want to find -- even if you find that there's
16 intentional copying, the presumption of intentional copy is
17 rebutted by evidence that the copying was done for a reason
18 other than to piggy back off the reputation of -- in this
19 case of Groeneveld. There was ample evidence in this case
20 that Mr. Eissis has no desire whatsoever to piggy back off
21 the reputation of Groeneveld. And there was ample evidence
22 that the pump was designed the way it was in order to be a
23 good functioning grease pump, and I guess I'll go back to
24 something I said in the very -- in my opening. Mr. Eissis
14:50:05 25 would have to be an idiot to have intentionally copied their

1 pump and then to have trimmed in red, put the red Lubecore
2 label on it, stamped his trademark into it in a number of
3 different places. If he wanted to piggyback back off
4 Groeneveld's reputation, I think he maybe would have chosen
14:50:22 5 a different shade of green or something for all of the trim
6 on there, and especially the follower plate would have been
7 black because Groeneveld's pump is black. I mean he
8 distinguished his pump, which means he didn't want to piggy
9 back off of any reputation of Groeneveld. And, in fact, he
14:50:40 10 testified that some people probably don't think the
11 Groeneveld has a great reputation and some people do.
12 That's fine. He took the risk even going with the way this
13 looks.

14 Moving on to likelihood of confusion -- hold on --
14:50:59 15 there's -- there was -- there was absolutely no testimony
16 whatsoever that anybody, any purchaser at any time of an
17 automated lubrication system has been confused when making a
18 purchasing decision about the look of the Lubecore pump and
19 the Groeneveld pump. All you heard was -- and this should
20 come as no surprise either. The first time people saw the
21 pump, they didn't know what it was. Yes, it looks like the
22 Groeneveld pump. No one's standing up here and saying it
23 doesn't. But, as soon as they looked at the label, even
24 Mr. Wapenaar said you can tell what it is from, you know, 50
14:51:32 25 yards away. You look at the label, and it identifies what

1 it is. In the Groeneveld world, we need to suspend belief
2 in labels. Labels don't matter I think is what the
3 testimony was. We can't trust labels. We better not trust
4 labels. We need to verify what everything is inside the
14:51:59 5 label. So the next time you go to your pharmacy and pick up
6 your prescription, and it says that this is drug X on the
7 outside, don't trust it. It's a label. Go home, find
8 someone who can make an independent analysis that the item
9 inside is the chemical compound it claims to be and don't
14:52:18 10 take it until you've got that analysis because we can't
11 trust labels. They don't tell us anything about anything.

12 Come on. This is common sense. The label tells you
13 as much as the label tells you. The label tells you here
14 that that's a Lubecore. The label on your prescription says
14:52:34 15 it's whatever -- you know, whatever prescription item you're
16 taking, the label on the can of green beans tells you what
17 it is.

18 The Groeneveld world makes believe somehow, get to
19 some notion that labels don't mean anything. Apply your
20 common sense to that notion. As far as the likelihood of
21 confusion is concerned also, wouldn't you have expected if
22 there was confusion in the marketplace that there would have
23 been some testimony from somebody even inside Groeneveld who
24 said we've had customers calling up and saying can I have
14:53:14 25 that neat red pump of yours? Was there any testimony of any

1 kind like that? Was there any testimony of anybody
2 approaching Groeneveld and saying boy, that new red pump of
3 yours, what's that, is that -- is that a cheaper version of
4 your green pump, is that a better version of your green pump
14:53:33 5 or you're trying to do some brand differentiation here and
6 have a green one and a red one, what's the difference?

7 Nothing like that. Because they understand and know that
8 the one pump is the Lubecore pump manufactured by a
9 different company entirely, and that it has no association
14:53:48 10 whatsoever with Groeneveld. If that evidence was out there,
11 surely we would have heard it.

12 The fact that that evidence isn't out there sort of
13 demonstrates that Mr. Eissis has and Lubecore have made a
14 successful effort in differentiating their brand from
14:54:12 15 Groeneveld's brand. The expert that you heard testify seem
16 to think that it hadn't, that Lubecore hadn't achieved that,
17 but since there's no testimony from anyone of confusion, one
18 would think that actually means they have successfully
19 differentiated their brand such as not to cause confusion.

20 Look at the pump. Look at the red on the pump. Look at the
21 logo on the pump. The trademark logo. Look at the logo
22 stamped into the housing. Look at the fact benefit analysis
23 when you're back in the other room, the fact benefit
24 analysis the Groeneveld does to explain how its pumps
14:54:52 25 differ -- how its pump is different and better than other

1 competitors' pumps.

2 Let's see P-64. Look at the sales literature. Go
3 back and look at the sales literature. The red Lubecore
4 trim, the red Lubecore teardrop trademark logo, the red
14:55:18 5 band, the red writing. Switch to the -- go back and look at
6 the web page of Lubecore. There's a version of it in the
7 exhibits. I think it might be old, but again, the Lubecore
8 teardrop logo, the red stripe, no effort whatsoever to piggy
9 back off of Groeneveld.

14:55:49 10 The second reason there's no confusion whatsoever is
11 the customers who are buying these items are sophisticated
12 customers. You've heard testimony about the number of sales
13 calls it takes to sell someone a system, and that only makes
14 sense. These are not cheap items. Like I said before,
14:56:06 15 these are not impulse items that you grab off the counter --
16 the front of the counter when you're at the CVS buying some
17 other things. People sit down, first they evaluate whether
18 or not they even want to go with an automatic lubrication
19 system, and then they decide if they want to make the
20 investment, is it worth it, how much does it cost, how good
21 does it work. Mr. Wapenaar testified that it took a number
22 of visits to make a sales call, four or five. Mr. Eissis
23 testified the sales process is complex.

24 The only counter that the other side had to that was
14:57:05 25 again in Osborn, who is the linchpin of their case

1 apparently. Mr. Osborn, apparently, didn't take five visits
2 to buy the Lubecore pump. Okay. It didn't take five visits
3 because he's been -- he's already overcome the issue of
4 whether or not he wants to purchase these systems.

14:57:07 5 Interchangeability. I'm not sure what this really has
6 to do with this case, but you heard the testimony from
7 Mr. Eissis. There is a level of interchangeability and a
8 level of non-interchangeability in these items. You can
9 swap out one pump for another person's pump in certain
10 systems. There are pieces, parts of the Lubecore system
11 itself -- injectors, blocks, lines -- that would be
12 compatible with other people's systems, EP-0 systems, and it
13 may even be some pieces off the Lubecore pump that are
14 compatible with Groeneveld's pump and perhaps others. Maybe
14:57:32 15 the reservoir works. Mr. Eissis testified that the
16 reservoir is not -- the reservoir on the taller version is
17 not one-to-one interchangeable because they're actually not
18 exactly the same height. So if someone wants to use it on a
19 Groeneveld pump, they have to get a change kit. But, so
20 what? I mean it's an issue that's a non-issue. Just
21 because some parts are interchangeable and some aren't
22 doesn't say anything. It's not relevant to any of the
23 issues in this case.

24 If you get to the point of considering damages in this
25 case -- and I don't believe you should -- first of all, I

1 think it's interesting that the Plaintiffs have gone with,
2 in terms of their contribution margin, that number that they
3 multiply by something else to come up with the lost profits.
4 They are using the 43 percent from Ms. Wilson, rather than,
14:59:10 5 I think it was 36 percent from the guy they paid \$30,000 to,
6 to derive a contribution margin. That's not hard to
7 understand, now is it? The \$30,000 guy, either he got it
8 wrong or they really rather use the higher contribution
9 margin because that would give them higher lost profits if
14:59:34 10 you get to that point.

11 This document here, which the other side keeps harping
12 on is what you would have to base your damages calculations
13 on, as it says is just sales revenues and sales projections.
14 There are no costs whatsoever taken out of that. Now,
14:59:56 15 please go to the other one. This is our Defendant's Exhibit
16 X, and it shows the relevant costs being deducted from the
17 sales revenue in order to come up with the profit or loss
18 that -- excuse me -- Lubecore has achieved on selling these
19 pumps in the United States. Go back and look at this
20 carefully, and you will see that in the three years that
21 it's been selling these pumps, it's all at a loss. No
22 profit yet whatsoever. So -- there's no profits for
23 Lubecore to disgorge on its sales of EP-0 pumps and systems
24 in the United States. As a matter of fact, look at how many
15:00:41 25 pumps it has sold in the United States. What is it? It's

1 less than 500 pumps when you add up the three numbers? Did
2 you really believe that Groeneveld has been damaged in any
3 sort of way whatsoever by the sale of 500 pumps by Lubecore
4 in the United States? How many trucks are there out there
15:00:56 5 on the road? Many, many, many, many orders of magnitude
6 more than 500.

7 And also remember what Dr. Burke -- what Dr. Burke
8 testified to. If there is no evidence that any sale of --
9 that Lubecore made of Lubecore system was as a result of the
15:01:27 10 alleged infringe activity, meaning that someone was confused
11 as between Lubecore and Groeneveld and actually thought they
12 were buying something that was associated somehow with
13 Groeneveld, then there are zero damages for this element of
14 damages, and I submit to you there has been zero testimony
15:01:44 15 on that.

16 Now, I asked you last Thursday to consider very
17 carefully who's competing carefully and who's competing
18 fairly in this case, and who's not competing fairly.

19 Is Groeneveld competing fairly for filing this
15:02:18 20 lawsuit? Is Groeneveld competing fairly for registering the
21 Lubecore name in three countries in Europe so that Lubecore
22 and its distributors cannot use that name overseas? Is that
23 fair competition? Is that a nice thing to do? They've
24 gotten up here in front of you and made it sound like
15:02:37 25 they're the good guys. Does that signify the good guys?

1 In my opening I said that I would -- the other side
2 would not be able to prove to you that Mr. Eissis has horns.
3 There's nothing sinister about what Mr. Eissis is doing. He
4 started a business, and he wants to compete in the
5 marketplace. He's competing fairly, and if his pump is bad,
6 if people don't want to buy his pump, the market will sort
7 that out. There's no need to preclude him in any shape,
8 way, shape, or form from selling his systems.

9 On behalf of myself and my trial team, Ms. Zujkowsk,
10 I would like to say it has been an honor and a privilege to
11 try this case to you. Someday you can tell your children
12 and grandchildren that you got to take part in the grease
13 pump trial of the century.

14 (Laughter.)

15:03:40 15 MR. ANASTOS: As I said in my opening, I hope
16 you take something away from this positive. I hope you've
17 learned something; if nothing else, about automated
18 lubrication systems. I hope you enjoyed yourself, and I
19 thank you very much for your attention.

15:03:52 20 THE COURT: Thank you. You may conclude.

21 MS. MICHELSON: Thanks, your Honor.

22

23

24

25

CLOSING ARGUMENTS ON BEHALF OF THE PLAINTIFF

MS. MICHELSON: The current design, overall appearance, and shape and the way Groeneveld pump looks and has looked for years, years and years, indisputably years -- Mr. Van der Hulst's testimony is it actually costs more to make it look this way. It would cost him less to make it a different way. The -- there is no cost benefit of making it look exactly the same way that it looks now, either Groeneveld itself or the Lubecore imitation. In fact, the only evidence here is that making it look exactly this way costs more. It is not functional.

Mr. Eissis' testimony is that it doesn't have to be this shape. It does not have to look this way to perform the function, the use, the purpose for which it is intended. It is also not functional for those reasons.

Mr. Vermeulen's testimony just doesn't hold up. He can't -- you know, he's -- he's off a little on dates. I mean come on. This is the guy who said that he remembered measurements and tolerances of the 50-plus Groeneveld pump component parts from when he worked there in the 1990s. But, he doesn't remember a date? And what is his testimony about the dates? He says there was a 30-year generation gap between the Groeneveld pump design of the pump that's at issue in this case and the Lubecore -- the Lubecore being the next generation. I guess that makes it the fourth

1 generation of the Groeneveld; 30-year generation gap. 2011,
2 minus 30 is 1981. 2008 minus 30 is 1978.

3 Even if you believe that Vermeulen was at Groeneveld,
4 as he says, in '84, again his dates, they just don't add up.
15:07:01 5 And these are dates -- these are numbers of an engineer who
6 claims to have designed not one, but two systems with a
7 30-year generation gap between them.

8 Mr. Vermeulen did not say a word to you about those
9 two -- those two pumps. The first type two. I have to look
15:07:30 10 at the Exhibit Number for the record because I can't
11 remember them. DX-AA and DX-Y. Mr. Vermeulen did not
12 testify that these were the pumps that were in existence
13 until he came to Groeneveld and saved the day and then, I
14 guess, went off to Korea. He did not tell you that.

15:07:59 15 And Mr. Willem van der Hulst -- the names are a bit of
16 a tongue twister for me -- he testified which one his team
17 designed in the 1980s and has been on the market for the 30
18 years that Mr. Vermeulen confirmed as its entry into the
19 market.

20 By the way, the implication that I somehow or that
21 Groeneveld somehow hid these two early pumps from you is --
22 let me just say I -- I will let you reach your own
23 conclusions on that.

24 Defense complains about the people we call to testify,
15:08:58 25 including by the way, their own Defense witnesses, I

1 suppose, the witnesses that somehow they were -- they're
2 saturated in the industry about which this case is involved
3 in, but we didn't just bring in Groeneveld people. There
4 was an end user customer out in Wisconsin, Mr. Osborn,
15:09:25 5 Orville White, national fleet customer out on the east
6 coast, they were distributors. Mr. DeCleene, Mr. Koppelman
7 who testified. You had testimony from Scott Marcum, a
8 Defense witness on these issues. And yes, you did have
9 people who are involved in Groeneveld. There was an array
15:09:48 10 of different people who participated and are involved in the
11 ALS world, which is what this case is about. That's the
12 relevant population. That is the relevant population.

13 You want 8,000 people to come in and say the same
14 thing. I don't know. I thought this trial was long enough.
15 You had a cross section of people who told you that they
16 recognized that Groeneveld pump on sight because of the way
17 it looks and those people include Mr. Koppelman and
18 Mr. Marcum, both of whom are actually Defense witnesses.

19 The label -- the label thing about the pharmacy, you
20 know, these are not -- these are -- the testimony in this
21 case is that the label is not the dispositive issue. It's
22 not the dispositive identifier. It's not the predominant
23 brand identifier. Every single person said it's the shape.
24 Mr. Koppelman -- again, their own -- their own guy said the
15:11:08 25 label's the last thing he would look at. And Mr. Vermeulen,

1 he actually said in his testimony you can't tell anything
2 about a product or its source or its origin by looking at
3 the label. Defense witness said that.

4 There was some insinuation on our damages that about
15:11:43 5 the -- that because Gail Wilson came up with a 40 percent
6 contribution margin -- and I read you the exact one because
7 I don't want to be accused of misrepresenting any of that to
8 you -- hers was 41.3 percent over a three-year period of
9 time, and Mr. Burkes' was 36.53 percent over a six-year
15:12:10 10 period of time that Mr. Burke told you himself does not have
11 statistical relevance. It's not -- it's within the range.
12 So you know what? The Defense doesn't want you to go with
13 Ms. Wilson's numbers of the \$1,225,627. They want --
14 they're complaining about that. Fine. You want to go with
15 Dr. Burke's numbers, we'll take the -- we'll take his
16 calculation of \$2,856,326, which by the way, doesn't even
17 include the 2009 sales because Dr. Burke didn't have that
18 information because we didn't have that information because
19 it wasn't included in the original materials the Defendant
15:13:07 20 gave us.

21 Five hundred pumps, 500 pumps, taking sales of 500
22 pumps is no damage. It's meaningless, it's nothing. Well
23 guess what? Five hundred pumps times the conservative \$1500
24 per system, per system that Ms. Wilson told you they -- is
15:13:48 25 for their distribution charge, the normal price they get

1 from when they sell it to distributors, that's \$750,000. I
2 don't know. I think that's damage. I think that means
3 something. Even if you believe it's only 500 pumps, which
4 you have to deem credible, 100 percent credible, the new
15:14:16 5 exhibit that they brought in two days before trial,
6 Defendant's Exhibit X, that's meaningful. That's harm.

7 It's no profit whatsoever. Guess what? Those numbers
8 are not verified in the new exhibit, Defendant's Exhibit
9 numbers. They're not independently assessed. They're not
15:14:41 10 authenticated. The person who did them aren't here. There
11 was nobody even checked to make sure they're accurate.
12 There were dates wrong in there. I -- and there are
13 deductions included in there that are not even permissible
14 under the law as the Judge gave it to you. And you can't
15:15:01 15 even tell that on the face of the document itself. That
16 being said, the Defendant has not demonstrated what it needs
17 to demonstrate in order to get the benefit of those claimed
18 deductions and expenses and costs.

19 You know, I've got to tell you something. No one
15:15:42 20 thinks Mr. Eissis is an idiot. Nobody, nobody thinks he is.
21 He's smart. He put a band of red in his pump. That's not a
22 red pump. That's a thin band of red and a sticker on
23 something that looks exactly like somebody else's product.
24 He's smart, but guess what? It doesn't make -- it doesn't
15:16:15 25 make -- it doesn't sufficiently distinguish the overall look

1 of his thing from the overall look of Groeneveld's thing,
2 and that's what a label needs to do to overcome the
3 predominant impression that you get when you see those
4 things because the label is not the predominant brand
15:16:38 5 identifier, and that band of red isn't either. It's the
6 shape. And every single witness told you that, including
7 Defense witnesses.

8 Ladies and gentlemen, Mr. Eissis knows very well
9 because he puts it in his marketing materials that it takes
15:16:58 10 20 years to build a reputation and five minutes to ruin it.
11 Time is up. Nobody enters the marketplace with a supposedly
12 improved product and makes it look that much like the
13 existing predominant product, exactly like the last
14 generation if they are truly trying to establish an
15 independent corporate identity and image, and they don't do
16 it in this industry for sure, and you know that because you
17 met a lot of people in this industry, and you know how they
18 identify pumps when they look at them and encounter them in
19 their industry and in their marketplace.

20 I never came here to prove to you that Mr. Eissis has
21 horns. I make no -- we make no character judgments here.
22 It's not about a bad person, a good person. That is not
23 what the case is about. When I heard it in opening
24 statement, it -- it -- it was such a discord in me because
15:18:25 25 it's not about horns or devils or bad morality; it's about

1 if the product confuses the marketplace.

2 I ask you -- we ask you, Groeneveld asks you to use
3 your common sense. I know you will. Look at the products.
4 Think about the real world, the real marketplace world in
15:18:54 5 the ALS industry, not when you go to a store and pick an
6 item, a can of beans off a shelf. Okay. I'm talking about
7 the marketplace that is at issue here, and the totality of
8 the evidence, the credibility of the witnesses, and your own
9 life experiences and common sense, and ask you to return a
15:19:15 10 verdict in favor of Groeneveld. Thank you.

11 THE COURT: Thank you. Almost finished.

12 Now, ladies and gentlemen, the verdict in this case,
13 and the answers to the interrogatories that I submit to you
14 have to be -- the considered judgment of each member of the
15:20:01 15 jury. So in order to return a verdict or an answer to any
16 interrogatory, all 12 of you must agree. In other words,
17 the answer to the interrogatory or interrogatories and the
18 verdict must be unanimous. So it's your duty as jurors to
19 consult with each other, to deliberate with a view to
20 reaching an agreement if you can do so without doing
21 violence to your individual conscience and good judgment.

22 But, you must each decide the case for yourself and do
23 that only after an impartial consideration of all the
24 evidence in the case with your fellow jurors.

15:20:33 25 In the course of your deliberations, of course, do not

1 hesitate to reexamine your own views and change your opinion
2 if you're convinced it's erroneous. However, do not
3 surrender any honest conviction as to the weight or affect
4 of any evidence solely because of the opinion of another
15:20:49 5 juror or your fellow jurors or for the sake of reaching an
6 agreement or a verdict.

7 Remember, at all times you're not partisans. You are
8 judges, judges of the facts as presented during the course
9 of this trial.

15:21:02 10 For your convenience, in order to assist you in
11 reaching a proper decision, I'm submitting to you a set of
12 written questions. They're called interrogatories. What
13 I'll do is display and read them to you, and I think once
14 you look at them and hear me give the description, they'll
15:21:17 15 be self-explanatory.

16 Interrogatory Number 1, you see the caption's on top
17 of each page. I say do you find that Plaintiff Groeneveld
18 proved by a preponderance of the evidence that its trade
19 dress, the external shape and appearance of the pump,
20 including logo and color, are nonfunctional? And there is a
21 blank space right there. I said in bold print insert in ink
22 either yes or no according to your findings. There are 12
23 signature bars located below that. So each of you sign in
24 the appropriate signature bar, and the juror that you
15:21:53 25 selected as foreperson signs on the first. The other 11

1 concurring jurors sign in whatever order you want. And then
2 the date that you do that, you insert here's the date. You
3 put the date here.

4 Down below I say if your answer to Interrogatory
15:22:07 5 Number 1 is yes, then you proceed to Interrogatory Number 2.
6 If your answer is no, do not answer Interrogatory Number 2
7 and enter a verdict in favor of the Defendant. Okay. I
8 think that's self-explanatory on that, but if your answer is
9 yes, then you go to Interrogatory Number 2, which says, "Do
15:22:26 10 you find that Plaintiff Groeneveld proved by a preponderance
11 of the evidence that its trade dress, the external shape and
12 appearance of the pump, including logo and color, is
13 distinctive in the marketplace, then it has acquired
14 secondary meaning," but again, your answer there, either yes
15:22:43 15 or no, according to your findings with the 12 signature
16 bars, and then the same dated line down below.

17 It says below that, if your answer to Interrogatory
18 Number 2 is yes, that means you've answered yes to both 1
19 and 2, proceed to Interrogatory Number 3. If your answer is
15:22:59 20 no, do not answer Interrogatory Number 3 and enter a verdict
21 in favor of the Defendant. Again, I think that's
22 self-explanatory.

23 Interrogatory Number 3 says, "Do you find that
24 Plaintiff Groeneveld proved by a preponderance of the
15:23:12 25 evidence that there was a likelihood of confusion in the

1 minds of consumers of EP-0 pumps as to the source of
2 Defendant Lubecore's EP-0 pump?" I think we spelled
3 Lubecore wrong, but maybe not. If I did, forgive me. And
4 then there's a blank space there. Either say yes or no;
15:23:31 5 again, according to your findings, the signature bars and
6 the date line.

7 At the bottom of that, it says, "If your answer to
8 Interrogatory Number 3 is yes, enter a verdict in favor of
9 the Plaintiff. If your answer is no, enter a verdict in
15:23:45 10 favor of the Defendant."

11 And then the verdict form. It says, "We, the jury,
12 being duly impaneled and sworn, find by a preponderance of
13 the evidence in favor of the Plaintiff Groeneveld on
14 Plaintiff's claim of trade dress infringement under the
15 Lanham Act, 15, United States Code, Section 1125(a), and
16 against Defendant Lubecore, and award damages, if any, in
17 the amount of," there's a blank space. I say next to it,
18 "Insert an amount from zero dollars to whatever you think
19 the evidence and the law requires." Twelve signature bars,
15:24:00 20 and a date form on the bottom. And then there's another
21 verdict form. If you find in favor of the Defendant, it
22 says, "We, the jury, being duly impaneled and sworn, find by
23 a preponderance of the evidence in the favor of," shouldn't
24 be that. Find -- got to change that. Where are you, Betsy?
15:24:17 25 Yeah, you don't find by a preponderance of the evidence in

1 favor of the Defendant. It just -- you find in favor of the
2 Defendant on the Plaintiff's claim. We'll change that
3 because the Defendant has no burden of proof as we told you.
4 Okay. I'll fix that, and then we'll get that to you at the
15:24:47 5 appropriate time.

6 Now, it's proper to add this caution -- and I am when
7 I give these instructions -- that is, nothing I said in the
8 instructions nor in any manner of presenting the
9 interrogatories to you or the verdict form is to indicate in
15:25:02 10 any way how I feel you should decide the case or what the
11 verdict should be. That's a decision that you make.

12 Now, immediately upon your retirement, you should
13 proceed to select one of your members as the foreperson.
14 Now, the foreperson has no greater authority nor any greater
15 responsibility than any other Members of the Jury, except
16 the Court charges the Foreperson with the responsibility:
17 One, of confining the discussions in the jury room to the
18 evidence and the law in this case; two, to making sure that
19 the interrogatory or interrogatories and verdict form are
15:25:34 20 signed and dated in ink according to the instructions that
21 I've given you; and three, that if there is to be any
22 communication with the Court, your foreperson has to sign
23 the note that's communicated to the Court and date it.
24 Otherwise, the foreperson has no greater authority nor any
15:25:51 25 greater responsibility than any other member of the jury.

1 Just as a kind of a caveat here, don't spend two days
2 arguing about who the foreperson is going to be because you
3 watched TV and you see that the Judge makes the foreperson
4 disclose the verdict because when you come back here in open
15:26:06 5 court, I will read the interrogatory answer or answers and
6 the verdict. So you don't have to worry about that.

7 Now, regardless of any opinion that you may have as to
8 what the law is or what the law ought to be, given the facts
9 in this case, remember as I've told you repeatedly, it would
15:26:22 10 be a violation of your sworn duty to base any interrogatory
11 answer or any verdict on any law other than the law that I
12 have given in the instructions in this case or the facts as
13 they have been presented during the course of the trial.

14 Now, I do hope that these instructions have been
15 sufficiently clear to enable each one of you to perform your
16 duties. Now, if you decide that you need to address a
17 communication to the Court, you must first reduce that
18 communication to writing, have it signed and dated. Signed
19 and dated. Okay? And then you can contact the Court by
15:27:01 20 using the push button located in the jury room, and then
21 I'll get the question and endeavor to answer it. All right?

22 And then after you have reached a decision in the
23 case, the final decision, you contact the Court, as I said,
24 by using the push button located in the jury room. We'll
15:27:17 25 bring you back here in open court and I will read the answer

1 or answers and the verdict form.

2 Now, let me say this that when you commence your
3 deliberations, again as I've said, this is America. Each
4 side or each person in an American jury has the right to
15:27:35 5 give his or her opinion about what you think the state of
6 the evidence has been during the course of the trial, and
7 each juror should give the courtesy to your fellow jurors
8 and listen to what they have to say; and then at the
9 conclusion of which, you can come up with a fair and
15:27:49 10 responsible decision.

11 Now, are there any objections, modifications, or
12 deletions to the instructions by the Plaintiff or the
13 Defense?

14 MS. MICHELSON: We have some.

15:27:58 15 THE COURT: Okay. Come up to the side. All
16 right. You can stand and stretch. This will take about a
17 minute or two.

18 (Discussion at side bar off the record.)

19 THE COURT: Okay. We're all set.

15:33:43 20 Now, we're going to -- you are going to deliberate in
21 our jury room, which is on 15. So somebody will take you
22 down there. Either Jeanie or Megan or Betsy or a
23 combination of all three, will take you down there and take
24 you the back way. And so you do the right thing, and then
15:34:07 25 we'll get the exhibits down to you. So I repeatedly

1 suggested to the lawyers they get everything ready in order
2 to go down so you can commence.

3 And let me say this; that as we begin, as you begin --
4 I did it again. As you begin your deliberations, you take
15:34:25 5 whatever time you think is necessary in order to reach a
6 fair decision. I've been in trials that lasted for months,
7 and the jury came back in five minutes. I had one case that
8 lasted two months. Not too long ago, I didn't even leave
9 the bench, I was talking to the Court Reporter, we got a
15:34:42 10 buzz there was a verdict. So other times you have a case
11 that lasted a day and the jury deliberates for five or six
12 days. The point of -- the moral of this story is you take
13 whatever time you think the evidence and the law requires.
14 There's no set amount of time. Long time, short time.
15:35:01 15 That's one thing.

16 The second thing is the nature of your deliberations.
17 Everybody has agreed that if you want to go on a break or
18 smoke break or go home tonight, and you haven't reached a
19 decision, that you can do so without me giving this
15:35:14 20 additional instruction, and that is this: That you may
21 discuss the case only when all 12 of you are together in the
22 confines of your jury room. So one or more people leave for
23 one reason to use the restroom, something like that, kind of
24 suspend your discussions and certainly don't disclose to
15:35:31 25 anybody the nature of your deliberations or the extent of it

1 until it's over. And then when you do that -- when you have
2 reached a decision, you come back here in court. As I said,
3 I will read the verdict. I say this in every case as well
4 because we don't know what goes on with, you know, people
15:35:46 5 watching TV and what's in your mind, but we have a court
6 rule that says nobody -- that means nobody has any right to
7 have any contact with any member of any jury without the
8 Judge first giving permission, and I don't give that
9 permission.

15:36:07 10 So you commence and conduct your deliberations secure
11 in the knowledge that no one will have any contact with any
12 Members of the Jury, nor will anybody look behind your
13 verdict for any reason. When your verdict comes out in open
14 court, that's it and your responsibility has concluded. So
15:36:22 15 you -- I say this, and I say it emphatically as I can
16 because, you know, you watch TV shows and you see jurors
17 being interviewed on the front steps of the newspaper or
18 lawyers chasing them down the street or something like that.
19 That's California.

15:36:35 20 We're in Ohio, and this is federal court, and so, and
21 we have our ways to enforce those rules, believe me when I
22 tell you. So it's not breached. It hasn't been breached in
23 my experience. So don't worry about that. All right.
24 Really goes more for a case that involves unbelievable
15:36:50 25 violence or something like that. People -- jurors have a

1 tendency -- my only story I'll tell you before you leave,
2 and that is you know I spent nine years as a Prosecutor
3 trying all kinds of murders and this, that, and the other
4 thing. Never throughout for a second the jurors would be
15:37:04 5 concerned about their safety. Never even dawned on me. My
6 first case as a Judge I walked in after the jury reached a
7 verdict, they all wanted to know who are all the people
8 coming in and out of the courtroom. They were all afraid.
9 You know, I was unsympathetic and didn't think about that,
15:37:21 10 that jurors are concerned with who the people are watching.
11 And then I made it a point to say like this in every case,
12 those are people on other cases. Some have an interest in
13 the case, most don't. Most people you see coming in or out
14 have other cases with me, just trying to figure out when I'm
15 going on break so they can talk to me. So don't be
16 concerned about that. That's really what that's all about.

17 So if you -- and then Jeanie doesn't like this
18 comment. We've had jurors here as late as 2:00 in the
19 morning. I'm not suggesting you stay here that way, but you
15:37:52 20 take the time you think the evidence and the law require.
21 So if you want to go home at our regular time, then you --
22 and you haven't reached a decision, let us know and you can
23 go home, and you'll resume and tell us what time you want to
24 start in the morning. If you want to go past then because
15:38:08 25 you think you may be able to reach a decision today without

1 coming back tomorrow, you do that, too. But, what I'm
2 telling you is no one is going to influence the course of
3 your deliberations. That's your decision to make. Okay?
4 So good luck. Oh, I should say this: You'll have a copy of
15:38:24 5 these instructions, the corrected verdict form, and the
6 spelling on Lubecore in the one verdict form, and you'll
7 have all the exhibits brought down to you very quickly, but
8 Jeanie, I think, will take you -- don't go out that door.
9 You walk in the closet. You can -- you can go out that way
15:38:41 10 and Jeanie will take you down.

11 (Proceedings in the absence of the jury:)

12 THE COURT: There were several objections made
13 to the jury instructions, and basically, basically it
14 involved the description of the trade dress claim, and the
15 Plaintiff doesn't want the logo and the colors included.
16 That's why I kept asking what the trade dress claim actually
17 was. And then it was the appearance of the pump. And so I
18 think that's proper. The objection is overruled.

19 Then we had, let's see, on Page 23, generic
20 configurations. The Plaintiff wanted generic designs. I
21 think configurations is enough synonymous of a word. And
22 then on Page 27, let's see. Here, I'm not sure what your
23 objection to 27 was.

24 MS. MICHELSON: On Page 22, our objection was
15:41:10 25 that the instruction regarding engineering necessity is

1 configuration.

2 THE COURT: That's right.

3 MS. MICHELSON: That that is only in cases
4 where there is a single core functional component, and that
15:41:22 5 our objection is that this -- that is not the evidence in
6 this case. Also on Page 22, your Honor, in the last
7 paragraph where it says distinctive about Groeneveld's pump,
8 other than the Groeneveld logo and green coloring, and that
9 every component of the pump performs a function and goes on,
15:41:43 10 and we think the correct -- we're objecting to the word, and
11 because we think that the correct word should be "or."

12 And we -- our further objection is as follows. We
13 think it should read as follows, totality of it. If you
14 agree with the Defendant that there's nothing arbitrary,
15 fanciful, or distinctive about Groeneveld's pump other than
16 the Groeneveld logo and green coloring, or that every
17 component of the pump performs a function and is part of the
18 pump for a reason and that their arrangement is functional,
19 you must find for the Defendant and it's not necessary to
20 continue.

21 THE COURT: I can change the word "and" to
22 "or." I don't know if that's a big --

23 MS. MICHELSON: Because I don't think we have
24 to prove both. And so I -- that was the basis of that
15:42:32 25 objection.

1 THE COURT: But, your -- I shouldn't say that
2 because your claim is the appearance of looking at it.

3 MS. MICHELSON: We don't have to prove both.
4 We prove one or the other.

15:42:43 5 THE COURT: You can prove -- you can prove the
6 logo is? All right. I'm not going to get into a debate
7 with you. Go ahead. What's on Page 23? I said the
8 configurations. So the objection is overruled on 22. 23,
9 configuration is the correct statement. 27, I'm not sure
15:43:00 10 what the --

11 MS. MICHELSON: Yes, I'll just articulate it
12 quickly. The instruction reads, jumping down one, two --
13 one, two, three, four, to the fifth line, "In the minds of
14 consumers." Our position is that the better statement of
15 the law is a likelihood of confusion or uncertainty in the
16 relevant market as to the source or origin of the two
17 parties' products. On Page 20 -- I don't know if you want
18 to rule or if I should just continue.

19 THE COURT: Go ahead. You had consumer in a
20 couple places. I think consumer is the right word.

21 MS. MICHELSON: Yeah, and it appears you are
22 correct, your Honor. On Page 28 where it says, "If you find
23 that there's not a likelihood that a reasonable consumer."
24 Our objection is that it's not just a reasonable consumer.
15:43:53 25 It's a reasonable person involved in the ALS industry would

1 be confused or uncertain as to the source or origin or
2 quality of the Defendant's EP-0 pump.

3 THE COURT: Okay. I don't think that's the
4 correct statement of the law. I think the consumer is the
15:44:08 5 correct statement. Okay.

6 Would you get the exhibits, if they're altogether,
7 when they come up with the --

8 MR. ANASTOS: How do we get the pumps down
9 there?

10 THE COURT: They're coming up with a carrier.

11 MS. MICHELSON: Your Honor, one other thing.
12 An exhibit, we marked an additional exhibit, additional pump
13 during Mr. Eissis' cross-examination, and we would like that
14 to be moved into evidence as well. I believe -- Melissa, I
15 don't think there's an objection.

16 THE COURT: No, there isn't.

17 MS. ZUJKOWSKI: There's no objection to the
18 pump.

19 THE COURT: Just mark it.

15:44:42 20 MR. KUNSELMAN: 143, your Honor. Plaintiff's
21 Exhibit 143.

22 THE COURT: Okay.

23 MS. MICHELSON: And then, your Honor, we're
24 going to mark as 144 the -- there's an exhibit on the
15:44:55 25 witness box.

1 MS. ZUJKOWSKI: Thank you, your Honor. This
2 is a marked version.

3 MR. ANASTOS: They're all marked.

4 MS. MICHELSON: We're going to mark and offer
15:45:03 5 as an exhibit as part of a proffer for Dr. Rashidi. We'll
6 mark his curriculum vitae and his report as Exhibit 144 as
7 part of the proffer.

8 THE COURT: All right. You can do that, yeah.

9 MS. MICHELSON: Then I -- it's 141 there
15:45:29 10 indeed then, not 144.

11 THE COURT: That's all right.

12 MR. ANASTOS: Your Honor, we do renew the Rule
13 50 motion.

14 THE COURT: All right. I'm still keeping it
15 under advisement.

16 MR. ANASTOS: Thank you.

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1 THURSDAY SESSION, OCTOBER 20, 2011, AT 6:34 P.M.

2 THE COURT: Mr. Moizuk, has the jury reached a
3 decision, sir?

4 THE FOREPERSON: Yes, your Honor.

18:43:04 5 THE COURT: Would you hand everything to
6 Jeanie.

7 For those of you old enough to remember Johnny Carson,
8 when I do this, I say that. Not too many people remember it
9 anymore. Okay.

18:44:18 10 Interrogatory Number 1, "Do you find the Plaintiff
11 Groeneveld proved by a preponderance of the evidence that
12 its trade dress, the external shape and appearance of the
13 pump, including logo and color, are nonfunctional?" The
14 answer is yes. Signed in ink by all 12 jurors, dated
18:44:34 15 today's date.

16 Interrogatory Number 2, "Do you find that Plaintiff
17 Groeneveld proved by a preponderance of the evidence that
18 its trade dress, the external shape and appearance of the
19 pump, including logo and color, is distinctive in the
18:44:46 20 marketplace, that it has acquired secondary meaning?" The
21 answer is yes, and signed in ink by all 12 jurors and dated
22 today's date.

23 Interrogatory Number 3, "Do you find that Plaintiff
24 Groeneveld proved by a preponderance of the evidence that
18:45:00 25 there's a likelihood of confusion in the minds of consumers

1 of EP-0 pumps as to the source of Defendant Lubecore's EP-0
2 pump?" The answer is yes, signed in ink by all 12 jurors,
3 dated today's date.

4 Verdict, "We, the jury, being duly impaneled and
18:45:16 5 sworn, find by a preponderance of the evidence in favor of
6 the Plaintiff, Groeneveld, on Plaintiff's claim of trade
7 dress infringement under the Lanham Act, and against
8 Defendant Lubecore, and award damages, if any, in the amount
9 of \$1,225,000. Signed in ink by all 12 jurors and dated
18:45:33 10 today's date.

11 Now, the single question I'm going to ask each one of
12 you is have I correctly read the interrogatory answers and
13 your verdict? Juror Number 1?

14 JUROR NUMBER 1: Yes, you have, your Honor.

18:45:43 15 THE COURT: Number 2?

16 JUROR NUMBER 2: Yes, you have, your Honor.

17 THE COURT: Number 3?

18 JUROR NUMBER 3: Yes, you have, your Honor.

19 THE COURT: 4?

18:45:46 20 JUROR NUMBER 4: Yes, you have.

21 THE COURT: 5?

22 JUROR NUMBER 5: Yes.

23 THE COURT: 6?

24 JUROR NUMBER 6: Yes, your Honor.

18:45:49 25 THE COURT: 7?

1 JUROR NUMBER 7: Yes, your Honor.

2 THE COURT: 8?

3 JUROR NUMBER 8: Yes, your Honor.

4 THE COURT: 9?

18:45:52 5 JUROR NUMBER 9: Yes, your Honor.

6 THE COURT: 10?

7 JUROR NUMBER 10: Yes, your Honor.

8 THE COURT: 11?

9 JUROR NUMBER 11: Yes, your Honor.

18:45:55 10 THE COURT: And 12?

11 JUROR NUMBER 12: Yes.

12 THE COURT: Thank you.

13 The verdict forms and -- the verdict form is correct
14 and the interrogatories are correct in form, and so I'm
18:46:02 15 going to accept each of the interrogatory answers and the
16 verdict. That will conclude any further service that you
17 have as jurors.

18 Is there anything further on behalf of the Plaintiff?

19 MS. MICHELSON: Your Honor, we do need to take
20 a matter up at side bar before you discharge the jury, in
21 light of the verdict.

22 THE COURT: Okay. Hang on. I know what
23 you're going to --

24 MS. MICHELSON: Yeah.

18:46:22 25 THE COURT: We'll deal with that at another

1 time. Maybe tomorrow morning.

2 MS. MICHELSON: It is --

3 THE COURT: There's another claim here of a
4 different type of damage that has to be litigated. And so
18:46:34 5 what that would mean is -- you probably didn't know this. I
6 couldn't tell you before -- you'll have to come back before
7 then. I know. I'll give you a choice. Come back tomorrow
8 or come back Tuesday morning. Shaun, you speak for the
9 crowd.

18:46:49 10 THE FOREPERSON: Tomorrow.

11 THE COURT: Same time, same station. Is that
12 fair?

13 THE JURY: Fair.

14 THE COURT: Thanks very much. See you at
18:47:29 15 8:15.

16 (Proceedings adjourned at 6:47 p.m.)

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1	CROSS-EXAMINATION OF JAN EISSIS	846
2	DIRECT EXAMINATION OF SUSAN COKER	897
3	CROSS-EXAMINATION OF SUSAN COKER	899
4	CHARGE OF THE COURT	934
5	CLOSING ARGUMENTS ON BEHALF OF THE PLAINTIFF	962
6	CLOSING ARGUMENTS ON BEHALF OF THE DEFENSE	992
7	CLOSING ARGUMENTS ON BEHALF OF THE PLAINTIFF	1015

C E R T I F I C A T E

10 I certify that the foregoing is a correct
11 transcript from the record of proceedings in the
12 above-entitled matter.

s/Shirle Perkins
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